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ABSTRACT

These proceedings were compiled from two separate institutes held in Ann Arbor on November 18-19, 1976, and again on January 20-21, 1977. Institute participants included directors of special education, school psychologists, school social workers, and teacher consultants from around the state. The papers presented here are composites of presentations made at both institutes. The major concern of the institutes was the involvement of parents in decision-making concerning the kinds of education provided handicapped students. Topics considered include the effect of court litigation, diagnostic testing, the relationship between school psychologists and parents, and student placement, particularly mainstreaming. (Author/IRT)

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# Alternatives to Litigation: The Necessity For Parent Consultation

*A Final Institute Report*

Michigan Department of Education

EA 010 219

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# ALTERNATIVES TO LITIGATION:
# THE NECESSITY FOR PARENT CONSULTATION

A FINAL INSTITUTE REPORT

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Michigan Resource Center (Title VI-C)

HELD
November 18-19, 1976
January 20-21, 1977
Ann Arbor, Michigan

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# THE NECESSITY FOR PARENT CONSULTATION

Institute Proceedings

Ann Arbor, Michigan

November 18-19, 1976
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Edited by

William C. Rhodes
and
Dwight P. Sweeney
Institute for the Study of Mental Retardation
and Related Disabilities

The University of Michigan
Ann Arbor, Michigan

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FOREWORD

These proceedings were compiled from two separate institutes entitled "Alternatives to Litigation: The Necessity for Parent Consultation" which were held in Ann Arbor on November 18-19, 1976 and again on January 20-21, 1977. The Institutes were funded through grants from the U.S. Office of Education, Department of Health, Education and Welfare and sponsored by the Michigan Department of Education, Special Education Services, and the Institute for the Study of Mental Retardation and Related Disabilities of The University of Michigan. Dr. William C. Rhodes was the Conference Director for both conferences.

Institute participants included directors of special education, school psychologists, school social workers and teacher consultants from around the state.

The papers presented here are composites of presentations made at both institutes. Whenever possible, questions from the sessions have been edited into or addressed directly in the texts of the presentations.

The presenters at the institutes were:

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The Institute Research Assistants were:

Jeffry Ackerman
Gary D. Bass
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Dwight P. Sweeney

The Research Assistants had primary responsibility to assist in institute design, development of pre-institute materials, site preparation, accommodation and transportation arrangements, and design of the institute evaluations and follow-up. In addition, they were very helpful both to presenters and participants during the actual institutes by providing other support services as they became necessary.

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W.C.R.

D.P.S.

# LITIGATION AND PSYCHO-EDUCATIONAL SERVICES

by

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LITIGATION AND PSYCHO-EDUCATIONAL SERVICES

This paper addresses issues in litigation by first developing some overall background materials to establish a common reference point, and then by looking at some of the implications of these issues on professional practice. Perhaps the most important thing to understand is the current tone and values of this society as individuals seek recourse in the courts to resolve problems between service providers and consumers. Everyone is aware of the growth of medical malpractice suits and the resultant increases in malpractice insurance that has occurred. It is probable that at least part of this problem is a result of the distancing that occurs between the physician and the patient; the lack of a relationship and the relative ease of initiating lawsuits. As in medicine, there is a growth of malpractice suits against attorneys.

I have speculated about the likelihood of malpractice suits against personnel in the educational service system; administrators, teachers, psychologists, social workers and others, and educational malpractice suits are being filed. At a time when people tend to think of the courts as a way of redressing problems, when there is growth of the consumer movement and consumers' efforts to make industry and service agencies responsible for what they do, people use the courts more frequently. Litigation is often the first action thought of, rather than an ultimate step.

Another national trend is the growing concern in terms of children's rights. Only recently have children been recognized as individuals with their own rights. Rights which must be protected for the child's interests may be different from those of the parents. We need to view the child as an independent entity, separate from the parents. For example, there have been

a number of law suits centering around "voluntary" commitment of minors. A commitment is called voluntary because the parent or guardian signs permission for the child. If you sign yourself into a mental hospital, that is a voluntary commitment. But is it truly voluntary if the parent requests commitment for a child? Does the child have the right for separate representation in the courts? In another area, can a minor get an abortion without the parents' permission? A third example is in divorce cases where until recently, the child was "represented" by the parents' lawyers. In all of these areas, court decisions and actions show that the interest of the children are separate from those of the parents and the children have a right to be represented separately.

It is interesting to note the extent to which courts are involved with litigation for children as separate from the parents. However, in the area of educational services, it seems most likely that parents will continue to be a strong force, bringing actions on behalf of their children, demanding that services be provided within mandated legislative, administrative, and constitutional parameters.

A primary area being litigated is that of a child's right to a fair classification. This includes the whole process of testing, labeling, and placing youngsters into special programs. Included here is the right to an appropriate education, including the removal of barriers to equal access to an education, and the understanding that any citizen, any disabled or disadvantaged child in the state, has the same right to an equal access to an education as any other child. Unfortunately, the rights of this group often are not considered or even understood.

The schools report that they have only so much money and they have all these normal students to serve. Where, they ask, do they get the money to run the special education program? If the school is short of funds, if they

can't run all their programs, courts have held that every youngster must share equally in the shortage. School administrators cannot balance for all the money that they're short by cutting out programs for handicapped children. These children have to have equal access to educational opportunities and they have to have proportionally equal dollars spent on them. That more than that, the education has to be appropriate and adequate for the students' needs. Now of course, schools don't do that at all. There are existing programs and the emphasis is to fit the student into the least damaging one, the best possible fit, but often these programs are not the most appropriate and adequate to the child's needs.

There has been considerable litigation in the right to treatment area. This is considered separately from right to education because, in the courts, it generally has been dealt with separately. It is a parallel of the right to education cases, except the focus is on residents of institutions. If you are placed in an institution, it's not a jail and it's not supposed to be worse than a jail, and theoretically the state has placed you there to treat you. They have the responsibility to treat you, not merely to provide custody. Treatment is required in exchange for the freedom the person has given up. Litigation has attempted to secure this right.

There are an increasing number of lawsuits in the area of civil rights, the rights of the individual on which the state cannot infringe. Included are the right for due process, the right for informed consent, the right of privacy, the right to be represented if there is any hearing or dispute, the right for the individual to present contrary evidence and a most important right, the one with which the educational system has great problems, the right to have a hearing officer who is impartial and not system related.

Another area of litigation has focused on free movement and free access. Efforts to address this problem are noted in terms of laws to remove

architectural barriers, both in public buildings, and in certain private buildings. Another aspect of free access is viewed in terms of transportation systems--both the rolling stock and the buildings. For example, much of the construction of busses in this country is controlled by a single company. It does not appear to be a competitive area and so busses are not built to be accessible. They are not as easy to get on and off of because of their high steps and narrow doorways. However, there are some companies which build busses that are accessible and have wide doors--busses that have the possibility of somebody in a wheelchair getting on and off relatively easily.

In a recent lawsuit, handicapped people were trying to enjoin the local bus company from using federal funds to buy busses that were not accessible to handicapped individuals. The defendants were arguing that they really don't have to provide those special busses. They felt they had to have places where the bus stops, to notify people where the stops are, to tell people what the schedule is, and to be sure to get the bus there. Now if you happen to be handicapped, and you can't get on our bus, that's your problem; it's not the company's. A few special busses would be available, but if someone can't use the regular bus, it is that person's responsibility to find another way to travel.

There has been considerable litigation in the area of institutional peonage or modern day slavery. The pattern has been for residents of the institutions to be placed on work assignments which were called training assignments. On occasion, the individuals would work on them for the rest of their lives. The residents receive no pay for work that clearly helps to support the functioning of the facility. Only recently has litigation forced the Secretary of Labor to recognize and enforce the laws that exist

for all citizens in terms of standards of payment for services provided also held for those people in institutions who were placed on work assignments, but are not being paid.

Community housing for disabled persons often is controlled by zoning. One of the major uses of zoning is to preserve certain kinds of neighborhoods. If enough land is required around the house and if there are enough requirements about the size and construction of that house, an economic basis defines who can live in that neighborhood. Beyond this, zoning laws have defined what constitutes a family. The family, defined in the middle class ethic of this society, is a group of blood-related people. It has been very difficult to get a group home into a single family residential area. A group of unrelated people have not been permitted to live as a family. The original intent probably was to control neighborhoods so that "hippies" couldn't move in and set up communes. However, the same zoning ordinances have been used very effectively in terms of limiting community based residences for retarded, mentally ill, and other persons. The end result is the isolation of this population. Despite talk about normalization, and return to the community, examination of the sites allowed for those houses usually reveals that they are in the worst part of the city, a part of the city where few would want to live, or to permit anyone else to live. What has been created is a community based "strip" of institutions with a mental retardation facility next to a halfway house for mental patients, a drug facility, and so on. They're all in the same general neighborhood, and the zoning has been used to counter an effort at normalization and integration into the community. The impact of these practices on schools has been pervasive and can be seen in the class and racial mix of students in the neighborhood school.

The next area of litigation concerns the right to privacy, the right to make a decision about one's own body, especially in terms of sterilization.

There has been a great deal of concern about this, and the choice of an individual to be sterilized or not to be sterilized is not a simple problem with which to deal. There have been programs which have required sterilization. For example, to get out of an institution, one of the things that has been required is that a resident would have to agree to being sterilized. Another example is where sterilization has been urged upon people on welfare, often without their full informed consent for the procedure. These practices are, of course, totally unprofessional and unethical.

However, there is another side to the sterilization issue: when the individual, using the judgment that he or she has, wants to be sterilized and then can't be. If I were to go to a local physician and wanted a vasectomy, the physician would talk to me about what his position is and about my general physical condition; whether I'm able to have the operation, or whether there is some constrainting condition. If I am young, then what does that mean in terms of not having children in the future. Then the physician would ask that I sign the permission slip and we would proceed. But what if I came to him and also had the label of being mentally retarded, then there would be a totally different situation. I might be denied that service based on my label. Even if I'm not adjudged to be incompetent, don't have a guardian, am legally able to sign, and decide that's what I want to do, I may have great problems in getting the operation. The physician may be concerned with a possible suit in the future and not operate. Thus, lawsuits can be used on either side in this situation.

A related situation is where parents are worried about possible pregnancies and decide to have a sterilization procedure done so that their daughter will not be able to conceive. A recent case was reported in which the family was petitioning that a moderately retarded girl of about 12 or 14 be sterilized.

Moreover, they wanted it to be done by hysterectomy, so they wouldn't have to worry about her having periods. That would take care of everything all in one step. She would be sterile, and she would not have the monthly problem. This operation, done at the request of the parents, might have relieved some of their concerns, but would it have been in the child's best interest?

The last area of litigation to be addressed here focuses on law suits about commitment. The courts presently are subscribing to a position of the need for the least restrictive environment. That is, individuals must be served by the state in the least restrictive environment. There was a case in Washington, D.C. involving a woman who was called mentally ill, but who only needed some supervision. She certainly did not need to be institutionalized. However, in Washington they had only two options. They could leave her wandering the streets, or they could place her in an institution. They placed her in the hospital. The woman finally got a lawyer, and appealed to the courts. The court held that the placement was not constitutional. The state was restricting her more than she needed to be, and it was not her responsibility to provide the least restrictive environment, it was the government's responsibility. She could live in the community if the needed supervision was available. Nevertheless, the institution was not appropriate for her because it was over-restrictive.

In terms of educational concerns here, what is considered to be the least restrictive environment, generally, is the regular class. Questions can be raised about that. Is the regular class in fact the least restrictive environment? Does the attitude of the teacher about getting the handicapped students and not wanting them (and that's a dumb kid, and that's a crippled kid, and that one's a something else kind of kid) work so much against the

student that the regular class becomes a very restrictive environment? A special class that is geared to the youngster may, in fact, be much less restrictive. However, we should expect the courts to deal with matters of law and not of fact. I believe they will rule that the least restrictive environment in the public school sector is the regular school classroom. If you remove a youngster from that setting, you're moving him into a progressively more restrictive environment, until at the end, major restriction is in some kind of institutional placement.

The difference between right to treatment and right to education is that right to treatment has been used in institutional cases and right to education is used in public school cases. But there are attorneys who now are considering legal arguments for dealing with schools in the exact same way they deal with institutions. If they are able to do this, we will be faced with demands for education, treatment and other services for our students as their right for being in a more restrictive environment than the regular class. The lawyers talk about this as being quid pro quo, this for that. If the state takes something from you, then it must also give you something. In the case of schools, the state takes some of the students' freedom (via mandatory attendance laws) and so must provide something in return (treatment or education). The argument is that placement in a school program for any child in any state where school attendance is required, is, in fact, a day commitment. The students are committed for 5 hours a day, for 180 days a year, for 10 years between 6 and 16. And if it is a commitment, then the same kinds of legal arguments that have held for the right to treatment would also apply in the area of right to education.

The landmark litigation in education was Brown v Board of Education, and a segregation suit in which the court held that separate programming is by law,

not by fact, unconstitutional. The law says that it is not constitutional to segregate students, even if professionals could "prove" contrary by setting up a program for Black students and have them do better than similar Black students in an integrated program. But that does not carry weight under the law. It is by law, not by fact, that segregation is not constitutional. Segregating students by excluding them from school or by putting them into special classes on the basis of race, class or sex is an unconstitutional act.

Brown focused on the role of the school as a major socializing agency in this society and it thereby provided the background for many of the other cases.

The second area of law suits relate to concerns of minority students who felt they were inappropriately placed in classes for mentally retarded individuals. Many of these were filed in the West where there is a whole series of law suits with Chicanos, Blacks, Oriental-Americans, and with Indians as plaintiffs. Larry P. v Riles, Covarrubias v San Diego Unified School District, Dianna v State Board of Education and Spangler v Board of Education, all in California; Guadalupe Organization v Tempe Elementary School District No. 3 in Arizona; Stewart v Philips in Massachusetts; and Lebanks v Spears in Louisiana are some of the early cases filed.

In almost all of these cases, the parties reached agreements where all of the demands of the plaintiffs were met. Limits were placed on schools on the instruments they used, qualifications of examiners and then ability to place disproportionately large numbers of minority children in special education classes.

A significant case was Hobson v Hanson, a law suit filed in Washington, D.C. for minority students who were being tracked by the schools. The higher the track, the fewer Black students were in the program. The court rules that

tracking was not legal as it limited the opportunities available to students who were placed in the lower tracks.

The third major area in litigation was the law suits against the institutions. Wyatt v Stickney, the case against the Partlow State School in Alabama, Ricci v Greenblatt, the case against Belcherton State School in Massachusetts, and New York State Association for Retarded Children v Rockfeller, the law suit at Willowbrook. A book entitled Willowbrook, A Report On How It Is and Why It Doesn't Have To Be That Way, by Geraldo Rivera, depicts from the point of view of the T.V. reporter who wrote the story, the conditions in that institutions.

There has been much significant litigation around the right to education. The two landmark cases are Mills v The Board of Education in Washington, D.C., and PARC v Commonwealth of Pennsylvania. Mills was significant in that it held that schools cannot exclude students and forget them. The school has the responsibility to educate every student no matter where the student was -- in the school, in an institution, or just at home. PARC (Pennsylvania Association for Retarded Children) v Commonwealth was specifically concerned with obtaining educational programming for all of the mentally retarded population. Since then, there have been additional law suits to apply this right to other disability groups. The court ruled that the state not only had a responsibility to educate all retarded students, no matter where they were, but had an affirmative responsibility to reach out and find the cases that they weren't serving.

We have been considering the impact of one of the three branches of government, the judical, on litigation. The government, through its power in the courts (as we learned from Brown), can impact on our programs very specifically. The second area where the government has power and can be a factor in litigation is the legislative process as new laws are passed and

we have additional requirements placed on professionals to serve special populations. The third area, one that has not been used very extensively, is using executive action to assure the rights of handicapped people. The Attorney General's office has been used to some extent. This is an approach that may be quicker than going through the courts and, in many states, a ruling out of the Attorney General's office has the same weight as a ruling of law. There have been some 49 specific Attorney General rulings on educational services for handicapped kids. This is just another way that rights can be guaranteed for people by going through the executive line rather than going through litigation.

When the legislative area is explored more comprehensively, an interesting picture arises. Education is a state responsibility because it is not mentioned in the constitution as being either state or federal. Things that are not defined in the constitution are presumed to be the rights and responsibilities of the state. States deal with that responsibility for education in terms of their constitution, in terms of laws and in terms of rules and regulations set up by the state education department. Original state education laws show that many of them look very much like a current mandatory education bill. They say that the state will provide education for all children. However, states started to move toward a system in which certain students were excluded. Children who couldn't profit from learning, and children who presented other problems were some of those excluded. State programs moved from the concept of a zero reject or a mandatory program for all children, toward a pattern of exclusionary practices, where whole classes of kids were excluded from school.

The legislatures recently have been addressing this problem by developing mandatory laws. Legislatures did this in an interesting way. First, they passed laws with delayed starting dates, and second, they did not

appropriate money to operate this new expanded system. The courts have held that the lack of funds is not a defense when services are mandated. Schools must provide constitutional safeguards and equal services for all mandated programs. These areas of education must be covered before you do other optional things (such as athletics and band).

In some of the states, the mandatory requirements are delayed for as long as 8 or 10 years, and will not be in effect until 1980. What has happened in those states is that they're having law suits, and the courts have held that the late starting date is not constitutional, and further, that they had to implement mandatory programs immediately. Even though the law wasn't changed, the court rulings, in effect, moved up the starting date. A majority of states do have mandatory legislation which grew out of the increasing demand by parents and professionals for some mandatory educational programming for all handicapped students. Eventually, Congress addressed the issue of mandatory special education which resulted in Public Law 94-142, the Education for All Handicapped Children Act of 1975.

Many people question the federal government getting involved in the state's rights area of education. The response is that the federal government is merely making money available to schools that want to apply for it. Their position is that it is elective on the part of the states, and states are buying into this, because there is a great deal of money, and the amount will be increasing over the years.

However, the cost of using the federal money is that the state must comply with certain federal mandates. One of the most important is the need to develop an individual educational plan for each student. This ties closely to the testing-labeling-placement sequence that has been under such heavy attack through the courts.

There are a number of concerns that professionals face in terms of testing, labeling and placement of youngsters. The first issue is that the most commonly used instruments used in assessing the intellectual functioning of youngsters are biased. They have been standardized essentially on a particular portion of the population and are not applicable across divergent population groups. They are peculiar to individuals who have a command of standard English and not for others. Moreover, I have heard questions raised about the use of the Spanish language version of the WISC in the West because it was standardized in Puerto Rico. People who are concerned in this area say that some of the items are as inappropriate as some of the English language items. So the first question raised in the area of testing, labeling and placement is the issue of the instrument.

Second, is the issue of the examiner. How well qualified are these people in terms of the students that they are examining or are attempting to assess? If I was to ask what a shed was, acceptable responses would suggest some small structure in the back of a house, alongside of a garage or something. A Chicano youngster was asked this question as a part of a test she was given and she said, "Oh, a shed is where my mother works." No credit. The examiner was not into the field farming culture of that area enough to know that that's exactly where the student's mother worked, in a packing shed in the field. This examiner gave no credit for a culturally accurate answer. When the examiner does not have any common experiential base with the student, does not have similar values, and also does not have the same language, questions are raised about the qualifications of the examiner, no matter how well certified and licensed by the university and the state.

Another major issue in testing, labeling and placement centers around the role of the parent. That is, in terms of the parents being informed

throughout the process, particularly being informed before the process starts. Recently, a local school sent a newsletter to parents in which it was reported that the school was cooperating with somebody to standardize a test with the middle school students. One parent wrote a letter to the building principal and to the superintendent which said not to use that parent's child. During a later discussion, the superintendent said he didn't understand the parent's concern. The university group that was doing the testing presented it to the school board, the board considered it, felt it was very appropriate, and so the parents' rights and interests were covered. The parent tried to explain that not only did he feel that his rights weren't protected by the school's action, but that what they had done was illegal. Parents do have a role, not after the fact, but before the fact.

Moreover, in the assessment process, parents should have an opportunity to provide important, adaptive data on the youngster. They should be part of the input. And, of course, toward the end of the evaluation process, parents should be involved in the decision-making process. They should participate in considering what the options are, the pros and cons of each choice, and then have a role in making the recommendations and finally, of course, agreeing to the decision.

Unfortunately, that is not the way parents often experience working with the school. Rather, following the model from the musical "The Music Man," professionals "con" parents. We tell them about their problem, and define it as their problem. Then we tell them we have this great thing, and it's called special education. We have students in smaller classes and a special teacher, and it's going to be great for a child. We're selling something that we're huckstering in very much the same way as the Music Man. We're conning the parents who often aren't aware of the implications when they sign the EPPC. They do agree, but often with the belief that the reason

they don't know is because of their inability to understand us. They are seldom aware of the fact that we may not be open and honest with them.

There have been many examples brought to my attention since the Mandatory Special Education Law was passed. Schools having "informal" sessions so that the parents did not have to be involved. Staff being directed not to EPPC a child into any program that did not have an opening in it. Individual plans designed to fit the available services, rather than the child's needs. Parents still are not being informed of their rights under law and the questions about the adequacy of the testing, labeling and placement process remain.

But perhaps there is some hope as parents learn to deal with us from a position of strength. I talked with a Chicano woman in a small California town. In the late 1960's she agreed to have her son placed in a special class. When asked why, she said she had talked to her consultants, the older women in this community. She talked to them, reporting that the school people said her son would be placed in a special class and that the teacher would help. She did not know it was a class for retarded children as the school personnel did not mention that. Her "consultants" said she should cooperate and so she signed the permission form. Then when a law suit was to be filed in that community, they were identifying possible plaintiffs; her son was one of the students identified as misplaced in a class for mentally retarded children.

During our discussion, which occurred in 1974, some years after the law suit was filed, I asked her what kind of relationship she now had with the schools. She reported a different experience recently with her youngest daughter. The school approached her about moving the youngest daughter ahead, that is, skipping a grade. The mother said she thought about it, and she said "even for Chicanos, my daughter is small," so she thought it would be better for her to go year by year. She said she didn't understand some of the things the school people were telling her, but she felt that they were not telling

her clearly. It wasn't that she didn't have the ability to understand. So she refused to cooperate, and she kept her youngster in the same grade. She said that since that time, she's had an opportunity to talk to other mothers who were being approached by the school to do one thing or another. Now that she's older, about eight years after the situation with her son, she is one of the consultants for the younger women in that community.

There is going to be this kind of reaction to the way that we try to sell people our product with little evidence of our understanding of the child's background and experiences, and with relatively little information provided for the parents. The parents' role is a critical one, and if professionals don't involve the parents, if they are not integrated into the process, and if professionals don't stop seeing them as the enemy, it's going to create situations in which a true adversarial relationship will exist. In this framework, the behavior of staff may very well stimulate parents to resort to the courts because the parents feel that we are working against them as adversaries instead of feeling that the school and parent working together in the best interest of a particular youngster.

Another issue in terms of the testing, labeling and placement sequence is the extent to which the label becomes a self-fulfilling prophecy. The label often sets limits on the child: you are MI (dumb kid); you are in an EI (crazy kid) class; and the teachers and the other students are all aware of this. We have many labels to place on children. We change them as we are forced to recognize the extent to which they have negative connotations. However, the new terms quickly are given all of the meaning of the earlier ones. Idiot, imbecile, moron all started out as descriptors of level of functioning. There have been many changes over the years as we now move to terms like educable or trainable mentally impaired. A teacher who did

not want to use the labels slow and fast ended up calling the two groups of students in her class the "rabbits" and the "turtles."

It doesn't make any difference if they are called the blue birds and the red birds; everybody knows where the smart students are and where the others are. Labels and this kind of grouping stigmatizes the students and most importantly, in this society, where mobility is so important, it defines their future status. If a student does not go through the academic school programs, if the child doesn't achieve academically and is channeled through one of these other tracks, the programming very definitely limits the person's future status. When teachers teach to the label, and when the label presents a limit to the view of the psychologist of other ways in which the child can be assessed, then the label forms the basis of the self-fulfilling prophecy.

The last concern in testing, labeling and placement sequence is that some testing may, in fact, be an invasion of privacy. There are questions that are not pertinent to educational programming. There are questions that are asked that are personal questions either to the youngster or to family and that we have no business even asking. The courts are considering the issue of invasion of privacy, and we may expect additional rulings in this area.

Closely related to the role of testing and labeling is the right to education--the right of the child to a free, equal educational opportunity. There are some major issues that are being dealt with here. The first issue is the issue of exclusion or of suspension, the denial of an educational program by using a variety of techniques. One is the waiting list-- the strategy of placing handicapped youngsters on a waiting list. Picture a wealthy suburban Detroit community with a waiting list for kindergarten one year. Imagine the reaction that the community would have. Waiting lists for special classes

have not been uncommon. That is one way of keeping a youngster out of school. Another way to exclude students that don't comply are suspensions or expulsions. If they are old enough, they become dropouts. The word "dropout" shows the power of language. When you say somebody is a dropout, it connotes certain things. First of all, it suggests there is an action, that the person did something. He dropped out of school. Many students are not dropouts, they are push-outs, they are shove-outs. They are students who may have made the best possible decision to get out of what may be a very damaging environment for them. But there is not another term, and so, with all of its negative connotations, the students are presented as being school dropouts. That is another way to exclude them from services.

A careful look at exclusion will disclose certain things. For example, minorities are over-represented in terms of their proportion to the population. Also, adolescent males and poor people are over-represented. Thus, in terms of the right to education and exclusion of certain students from that right, there definitely appears to be class and racial factors that apply here.

A second issue under the right to an education is that the quality of the program and the progress of the youngsters is not reviewed. Students are placed in available settings with existing resources. Situations exist where the books that are used may be left over from the regular classes. Extra and special purpose items are in short supply. The support for the program is not there so the quality is also not there.

Another issue under the right to education is that racial minorities and poor people are over-represented in special classes. This has been a common practice over the years, and studies of the composition of special classes in large cities show that the majority of students are drawn from the new poor populations that are moving into the city.

Another issue under the right to education is the protection of the individual rights. This involves all aspects of the movement of youngsters from a regular classroom into a special class without due process and informed consent, without a hearing, or without any of the constitutional safeguards that exist. The courts hold that this is not permissable and schools must address the rights of the individual within school settings.

The next issue is the charge that special education not only is not a quality program but, in fact, that placement in special education classes is harmful, that it is a dumping ground, a cemetery where we bury the students that don't fit into our regular programs. The stigma that is attached to placement in a special education class follows a youngster through his life.

Basic to understanding the right to education is that this right of a handicapped child to an equal educational opportunity is guaranteed by law. The laws have been modified in recent years to guarantee this for all handicapped students and it is the school's responsibility to see that the youngsters are served whether they are in the schools or in an institution. The school has the responsibility to serve all children who are in the legal age range regardless of placement. The exclusionary practices of the past are no longer legal.

In conclusion then, a few points must be emphasized. When we talk about special or exceptional students, generally they are the ones who don't fit into the usual school pattern for behavior or performance. They are not the students who did well in grammar school and are going to do well in high school. Usually, they are not the ones who functioned adequately in grammar school and who go on into business, general or vocational programs. Special needs students are those who really don't fit well and so schools have created special systems for handling them. That's the nature of special education and

that is the basis for the whole labeling system. If the youngsters who get caught up in the system are closely examined, they don't really resemble each other very closely. They vary from the expected norm that will be tolerated in the school; vary either intellectually, emotionally, physically or in terms of behavior or performance. They are students who are different--either they don't speak English, they aren't white, they may be poor, or they may just not be happy with the school situation. James Herdon, who talks about what these students are, says that all the terms for special kids really just mean kids who can't, or won't, or don't do things the way the school thinks they ought to be done. Once labeled as special, the school can pretend that there is a normal group as well which is served by the custom of the school. The school's obvious inability to satisfy many children then can become natural since the child is a special child and shouldn't be satisfied by normal procedures and the school does not need to change its ways at all. It only has to create some special arrangements on the outskirts of the school to keep the special children and the special teachers out of the way.

Currently, teachers, psychologists and others are in the midst of a very pervasive movement: school personnel expect certain things in classes and they communicate this value throughout the system. The parents often bring the same kind of values to achieve and to fit within the existing school model. The psychologist and the counselor may respond by encouraging less well behaved or poor performing students into special programs or out of school, and this whole process protects the school from the challenge to its competence that these children make. It is difficult to overcome this orientation. School personnel must see themselves as part of the situation--as part of the problem.

As a professional in the field, one of the things that it is hardest to deal with is my own personal responsibilities. My concern here is I don't

ever want to assume a posture of "What do I do to stay out of court?" That is too negative. To me, a better question is what kinds of things do I do to insure that the rights of the youngsters and their families I am serving are safeguarded.

Our defense is in the extent to which we believe in the individuality of the person that we are assessing. It is related to the extent to which we are willing to protect the rights of that child, that student, and to consider an ecological view of the problem. We are not assessing a situation that resides in the individual, but rather the result of the interaction between the student, the school environment, and the remainder of that student's environment. It is only when all of these factors are considered, when parents are fully informed and involved, when the focus is on the needs of the student rather than those of the system, when an ongoing dialogue is maintained between the school and the home, and when professionals recognize their own limitations when dealing with particular students, that a reduction in litigation may occur.

# PROCEDURAL PROBLEMS IN CONDUCTING AN EDUCATIONAL PLANNING AND PLACEMENT COMMITTEE MEETING AND A SPECIAL EDUCATION HEARING FROM AN ADVOCATE'S PERSPECTIVE

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# PROCEDURAL PROBLEMS IN CONDUCTING AN EDUCATIONAL PLANNING AND PLACEMENT COMMITTEE MEETING AND A SPECIAL EDUCATION HEARING FROM AN ADVOCATE'S PERSPECTIVE

## INTRODUCTION

The adoption of the Michigan Special Education Code has resulted in many substantive changes in special education services and practices. The Code has also created a new cast of characters in the area of special education. Perhaps the least recognized members of this new cast are the parent advocates. This paper addresses the procedural aspects of special education from the perspective of an advocate. As an advocate I have had the opportunity to observe the special education process from a somewhat unique perspective which I believe can be of assistance to educators in refining procedures in special education.

I would like to direct my remarks to three areas:

(1) some observations on the significance of the Special Education Code

(2) an analysis of problems of due process hearings in education

(3) and finally I would like to sequentially trace the special education placement process and outline some of my concerns with the procedures.

## I. Some Observations on the Significances of the Special Education Code

From the perspective of an advocate, there are many aspects of the Special Education Code which represent significant educational advancements. One of the most important is the provision for parental involvement. American education for many years has been considered a closed system. Educators believed, for various reasons, that too much involvement by parents and outsiders would necessarily result in a diminution of their

control over education without a corresponding benefit in the quality of the educational process. Consequently, a large number of parents were sold the idea that the best forms of parental involvement were through voting for the levy of mills or the traditional P.T.A. activities of parents' nights and bake good sales culminating in the purchase of various paraphernalia for the building. But parental involvement is a broader and more viable concept. It includes the sharing of information between the parent and the school, the detailed discussion of that information, joint responsibility for programmatic determinations, and a recognition that parents must reinforce the child's school program in the home. The Special Education Code provides the necessary framework for this type of intensive parental involvement; and it is through the exploration of this type of involvement that we will ultimately find sound approaches to the question of accountability in special education.

The provision for parental involvement also calls for a "system of joint decision making by educational specialists and the parents." A system of joint decision-making is important in two aspects. First, because it provides for a systematic decision-making scheme which can be easily implemented and independently reviewed; and second, because it includes parents as an integral part of that system. Both of these help to protect the interest of the child through the parent.

Another significant aspect of the Code is the recognition that situations invariable will arise where the parents and educators cannot reach accord on a satisfactory educational plan for the child. In such situations the Code adopts a state-wide due process procedure for an

impartial hearing that culminates with an appeal to the state superintendent of public instruction. Through the hearing and appeal procedure parents should be able to test the validity of the school's decision with the assurance that they will receive a full and fair hearing of their concerns.

In addition to mandating a due process hearing and appeal at the request of the parents, the Code allows parents to utilize lay advocates or attorneys to assist them with the hearing and requires the school to notify parents of organizations in the community that will assist them in preparing for the hearing and presenting their side of the case. Although I will comment more fully on the use of advocates at a later point, suffice it to say that such a system has the potential for affording maximum protection to the student and parents by assuring that placement and programming decisions are educationally sound and procedurally fair.

I have reserved for last, what I consider to be the most significant educational aspect of the code -- not so much from the perspective of an advocate, but from the perspective of one deeply concerned with the educational welfare of students -- and that is the requirement for a written curriculum plan based upon individual performance objectives for each student in accordance with his/her <u>needs</u> in the cognitive, affective, and psychomotor domains (340.1733[b]). I feel that it is significant because it will prevent the type of mass programming now pervading educational institutions which ignores the needs and abilities of the child, frustrates the creative teacher, and results in learning only by coincidence. Individualized curriculum plans and

performance objectives are an educational affirmation of student individuality and personality. They require teachers to interact more closely with the student as a total human being with educational needs that are distinctly different from every other student. They also offer educators an opportunity to experience teaching within a formal system of individualized instruction and learning which will aid in the refinement and expansion of the concepts for more generalized utilization.

It is difficult to deny the validity of the view that the educational decision-making process of the Special Education Code is a special process for children with special needs. However, in a broader sense that decision-making process has potentials for all children. I believe that these potentialities are beginning to be recognized and acted upon. I am referring to the present discussion in the state of New Jersey. Last year the state's school finance system was invalidated on the grounds that it denied equal protection of the law. What is being suggested as a possible alternative is a system similar to our Special Education Code whereby, on a statewide basis, each student's program is determined by the equivalent of an EPPC with procedural safegrounds similar to our Code's. The provision of state funds is then based on programming and services required by each student. While such a system may well be beyond the present capabilities of New Jersey or Michigan or any state, it is, nevertheless, a direction to explore as we continue tc evaluate and implement the Michigan Special Education Code.

II. Problems in Providing Due Process Hearings in Education

Over the past twenty years, the courts and legislatures in this country have increasingly found it necessary to intervene in the operations of public schools with declarations of legal requirements for educational practices. Consequently, educational policies and practices have been more profoundly influenced by the law than by educational philosophy or theory. While the desirability of this legal involvement can be discussed ad infinitum from varying educational, legal, and political perspectives, what remains is the practical problems of how to comply with the letter and spirit of those laws.

Within the past few months there has been several new legal developments affecting education: The Educational Rights and Privacy Act, governing student records; the Supreme Court decision in Goss v. Lopez dealing with short-term suspensions; and Woods v. Strickland dealing with school board member's liability for violations of students' rights. There is a common thread throughout all of these developments -- they all concern the hearing rights of students and parents. When these developments in the area of hearings are added to the existing special education and expulsion hearings, one must conclude that schools and parents will be involved in several different types of hearings. While these hearings will be to determine educational rights, they are nonetheless legal in nature. The imposition of a requirement for due process hearings places a legal burden, both upon the school and the parents.

The school's underlying burden is its responsibility for providing hearing officers to conduct the hearings. To a certain extent the local districts and the state board of education have miscalculated the nature

of that responsibility by assuming no special skills are necessary to conduct a hearing. However, the hearing officer must not only be knowledgeable of the mandated procedure, but must also understand his/her role in conducting a hearing, the process of weighing evidence, how to reach a decision and how to prepare a written statement of finding of facts and conclusions of law. There are difficult tasks even for those trained in the law. To assume that any person who is fair-minded and impartial can adequately perform that function is to do violence to the concept of due process and to make a travesty of the hearing procedure.

I am not suggesting that these lawyer-like functions are beyond the capabilities of the average administrator. I simply suggest the need for training and screening of those who will perform that function. More specifically, I am proposing that a training program be established so that districts can train personnel to perform that function effectively.

The burden that due process hearings place upon parents is quite different but related, and it is illustrated by the Special Education Code. The Code recognizes the need and provides for assistance to the parents through advocates. Furthermore, the Code requires the school district to inform the parents of organizations to assist parents in preparing for a hearing. And finally, the Code provides a due process scheme for the protection of parents and students. But such protections are illusory in that skilled advocates are generally unavailable to parents unless they are able and willing to retain private counsel. To combine an unskilled hearing officer with a parent with only a minimal understanding of procedure and no skills in advocacy is to humble a very

noble and worthwhile concept. There is a genuine need to begin to develop training programs for advocates and to institutionalize their utilization.

Basically, I think the solution to the problem of law and education, especially as it relates to hearings, is in training the key people who will participate so that they are skilled in their task and knowledgeable about procedures. And it is through this skill and knowledge that we will arrive at the fair and accurate decisions that we all desire.

## III. Sequential Examination of the Special Education Placement Process: Concerns of the Advocate

I would like to devote the remainder of my presentation to a sequential examination of the special education process, highlighting some of the problems that I have encountered as an advocate.

If I may digress for a moment, I think that it is important to mention briefly what I consider to be my function as an advocate. At the hearing stage the advocate has the obvious function of vigorously representing the interest of the parents in much the same manner as an attorney would represent a client. But the lay advocate in the educational setting has the additional responsibility of educating the parent by explaining procedures and policies, and helping the parents to recognize the available alternatives and the possible consequences of each. Once a decision is made by the parents, the advocate vigorously represents the parents through presentation of evidence, refutation of opposing positions, questioning of witnesses, and the argument of procedural and substantive issues. Because I view the role of the advocate in such broad terms, I have had no occasion to wander outside the purely procedural areas into

some that are basically educational. Although I view these areas as educational, they are critically important to the preservation of procedural safeguards of parents and, consequently, of the utmost concern for the advocate.

Before moving into my sequential examination I would like to comment on one issue that will effect many procedural aspects of special education -- student records. Under the new Family Educational Rights and Privacy Act it will be necessary for the school to develop policies covering the release of information. It is important that local and intermediate districts pay special attention to their special education responsibilities as policies are developed pursuant to the Act. Although time does not permit a detailed analysis of the policy implications, a couple of the issues to be considered include:

-- Relationship between local and intermediate districts

-- Does the Act require local districts to obtain parental consent before transferring records to the intermediate district? Or must they simply notify the parents of the transfer?

Additionally, local and intermediate districts should make sure that those persons who will be acting as hearing officers are included within the class of school personnel who have legitimate educational interest so that records can be released to them without consent.

These are but a few of the special education considerations that should be included in developing record policies. Additional information pertaining to the Family Educational Rights and Privacy Act is available by writing to the Program for Educational Opportunity.

## A. Suspicion of Need

Contrary to the provisions of the Special Education Code, I believe that the need for the advocate begins much earlier than the hearing stage. The first area that will merit scrutiny by the advocate is the initial step which I refer to as the "suspicion of need stage." At this stage someone in the school suspects that the child may be in need of special education services. As an advocate my attention will focus upon what occurs on the basis of that suspicion. More specifically, is there a procedure, known to building personnel, for acting upon such a suspicion that includes:

1) who to inform of the problem

2) documentation of problem

3) documentation of any attempts by the teacher to solve the problem

4) the objective evaluation of the problem by an impartial specialist

5) notification of parents.

In the absence of these or similar procedures, the advocate should consider the case suspect and proceed cautiously.

A very serious problem at this stage of the process is the issue of suspension. The Code provides that the Superintendent of the local district is responsible for making changes in the status of handicapped persons except where section 340.298(c) or 340.613 of the Michigan Compiled Laws are applicable, in which case the Intermediate Superintendent is responsible. The critical section is 340.613 which states:

Sec. 613. Expulsions of children; handicapped, evaluating.

The board may authorize or order the suspension or expulsion from school of a pupil guilty of gross misdemeanor or persistent disobedience when in its judgment the interest of the school may demand it. If there is reasonable cause to believe that the pupil is handicapped, and the local school district has not evaluated the pupil in accordance with rules of the state board, the pupil shall be evaluated immediately by the intermediate district of which the local school district is constituent in accordance with section 298c.

To begin with, I have serious doubts as to the intent of this provision. If it is a good faith effort to get necessary services for children, it possibly is acceptable. But if that is the case, then I do not understand why the school is not prohibited from suspending the student until after the evaluation; if it is a good faith effort, why aren't protections built in so that a student may prevent evaluation based upon such a nebulous standard as reasonable cause? After seeing from first-hand experience some of the trivial conduct for which students are suspended, I think the only way to prevent abuse of this broad power is to require the school to stay the suspension decision until after an evaluation. I do not believe that it is in any way justified to suspend a student who may be in need of special education services.

B. Diagnostic Decision

The next step that attracts my attention is the diagnostic decision. This area is a particularly difficult one for me because I do not have training in educational or psychological testing and I am generally suspicious of standarized tests. The problem becomes even more acute when dealing with a situation where the child is racially or culturally different and the suspicion relates to a possible learning disability or emotional impairment.

Paranoia aside, however, the primary function of the advocate is to ask some basic questions:

1) Has there been compliance with intermediate district plan?

2) At what level and by whom was diagnostic decision made?

3) Were parents consulted?

4) Did the parents consent?

5) What type of diagnostic evaluations were requested and can provide information relating to alleged problem?

6) Who conducted the evaluations?

7) Is the reliability of instruments used for the child being evaluated?

Beyond asking these basic questions the advocate should seek the assistance of a trained specialist.

C. Appointment of Committee

The next area of concern is the appointment of the EPPC. The Special Education Code requires that the Superintendent of the local district appoint the EPPC, which shall consist of at least four members including:

1) a representative of administrative personnel

2) a representative of instructional personnel

3) a representative of diagnostic personnel

4) and the parents.

The Code offers no guides regarding the maximum number of school staff that can be appointed. However, school districts should carefully consider the issue and attempt to restrict the committee to 3 or 4 professionals. If other personnel are needed they should be invited to EPPC meetings on an ad hoc basis to offer information. The stacking of the committee with too

many professionals has the tendency to overwhelm the average parents and may impede the full participation of the parents. In a smaller group setting it is easier for the parents to establish rapport with the members and feel comfortable in asking questions and expressing their concerns.

Although the Code does not speak to the issue, there should be a mechanism for the parents to challenge the appointment of any person to the committee. If there are persons whom the parents, for any reason, feel uncomfortable with, it is more efficient for that person to be replaced so that conflicts do not arise that will obstruct the successful completion of the committee's tasks. This suggestion is not intended to constitute parental appointment of the committee. However, under the structure provided by the Code the only people who are not expendable are the parents. So, in cases of parental objection, it is not unreasonable for the school to replace any of the three required professionals.

A related issue at this stage is specifically informing the parents of who has been appointed to the committee and limiting the meeting to those persons. Many districts, in the letter requesting parental participation, will inform the parents of who the other members of the committee will be. I think this is a good practice for districts. If the district feels it is necessary to have other staff persons at a particular meeting, they should notify the parents in advance. Nothing can be more upsetting than to walk into a room expecting four people and finding ten. If the parents are already apprehensive about the EPPC, such unexpected occurrences can change that apprehension into mistrust.

In relation to the problem of parent apprehensiveness, or mistrust of the EPPC process, one way to allay such fears is the designation of a staff liaison person for the parents. If the district would designate at some stage before the initial meeting of the EPPC a staff member to act as liaison, that person could perform several functions. He/she could be the individual staff member responsible for all communications to parents, responsible for informing the parents of the purpose and process of the EPPC and answering any questions that the parents have. The liaison could also be a central informational point for other staff members, as diagnostic and other information is gathered by designated personnel. Finally, the liaison could be the familiar face necessary for parents to begin to establish trust.

One final point about the committee appointment stage. Although I have mixed feelings about discussions concerning a child's placement by school personnel without the parents, I do think that some discussion is necessary to set up an agenda for the meetings; to make sure that the necessary information has been gathered; and to begin to focus the issues so that a cogent presentation of information can be made. If the professional staff members are unaware of what the issues are and have no sense of direction, then the meetings will tend to confuse the parents rather than assist them in making a decision.

## D. Conduct of EPPC

One of the major deficiencies of the Code is the failure to provide specific procedures for the conduct of EPPC meetings. The absence of a specific procedure raises several issues for the advocate:

1) Does the parent have a right to bring an advocate to the meetings? The section of the Code dealing with representation discusses advocates in the context of a hearing. No mention is made of the right to an advocate at the EPPC meetings. However, I have been allowed on several occasions to appear with the parents at the EPPC and have generally had the cooperation of the school. I believe this to be a sound practice. If the parents feel the need for an advocate at this stage, there is little reason for the school to resist such an attempt. The EPPC is a critical stage of the placement process. By allowing an advocate at this stage the school may be able to resolve matters in the relative calm of a conference atmosphere rather than in an adversarial hearing.

2) Should the school make a complete record of EPPC meetings? The Code only requires the school to make a complete record at the hearing stage. It is the common practice of many committees to appoint a secretary who takes notes and prepares minutes. This practice may serve the purpose for a majority of cases. However, when discrepancies arise concerning what took place at the meeting or the accuracy of the minutes, there is no way to resolve them. If the resolution of those discrepancies is critical to the outcome of the hearing or appeal, it is difficult to establish the facts. A possible solution is to tape the EPPC and to prepare the minutes from the tapes. At the end of the EPPC process, if the parent accepts the recommendation, the tapes can be destroyed. If the parent rejects the recommendation, the tapes are available for the parent and advocate to prepare their case.

3) Is the parent required to provide interpreters for parents at the EPPC? The Code speaks only to the issue of interpreters for evaluation purposes. However, interpreters may still be required under Title VI or other federal legislation. Most schools, however, willingly provide interpreters when necessary.

4) How are the recommendations on eligibility placement reached? The Code gives little guidance in the area of how the various committee decisions are made; whether it is by voting

and if so, by a simple majority or 2/3 majority or some alternative method. I am not sure how to resolve this problem but I would suggest that every possible alternative be used prior to a resort to voting. The committee, by its very nature, must include a majority of school personnel and to resort to a vote, especially where there is sharp disagreement, gives the appearance of a sham. The ultimate solution to this problem may have to be in some type of negotiations model where there is burden on committees to attempt to negotiate problems before recourse to a hearing.

5) Does the school have an obligation to present alternative programs? The Code clearly obliges them to do so. After the committee has determined the eligibility issue, there remains the issue of placement. It is here that I believe that school personnel can be most helpful to parents by using their expertise to present the alternative types of programming which will meet the child's needs also considering the parents' input as to the various programs based on the parents' expertise. Hopefully, through the merging of these expertise, a sound program can be developed for the student.

Two additional comments which do not necessarily relate to deficiencies of the Code but to more generalized concerns. First, I would like to strongly urge the appointment or selection of a chairperson for the committee and the active assumption of the role by that person. If the members of the committee recognize that there is a chairperson, it may aid in resolving conflicts especially when two or more antagonists threaten to disrupt the meeting by dealing with personalities and not issues. Second, I would like to suggest the use of agendas by the committees so that members may formulate a sense of direction and the chairperson may use it as a device for directing the discussion of the issues.

## E. Notice to Parents

Most districts have not encountered problems in terms of informing parents concerning the placement. However, I strongly urge that the notice include all the elements outlined by the Code, which includes a description of the proposed action and information about hearing rights.

1) Description of proposed action. In some situations it may be unclear to the parents exactly what the recommendation of the EPPC was. To simply refer the parents back to the recommendation of the committee may be confusing. I recommend a full statement of the proposed action and the underlying eligibility determination.

2) Informing parents of hearing rights. If the district does not have any sort of parents' handbook explaining hearing rights, then the school should develop some type of statement outlining those rights in understandable language and emphasizing the time deadlines. Because of the problems of a lack of advocates mentioned earlier, the school should also request that the parents notify them if they wish the assistance of an advocate and cannot locate one. The school may be able to further assist the parents in the search.

An additional consideration in this stage relates to program changes. In the period provided for the parents to respond it is important to remember that changes in programming cannot be made under the Code. This fact should be made clear to all building level personnel who have responsibility for the child's present educational programming.

## F. Hearing Decision by Parents

Although this stage of the process is normally not one in which the school is involved, a couple of points on the advocate's role may be helpful to you. First, I will normally attempt to discuss the decision with the parents and offer my suggestions. I try to consider and present two factors:

1) the suitability of the recommendation

2) procedural compliance.

Sometimes, even though the recommendation is acceptable, procedural irregularities are so flagrant that careful consideration must be given to requesting a hearing to establish those violations. This is usually a very weighty decision for the parents and the advocate. But in certain instances after weighing all the factors -- the acceptability of the recommendation, the possible inconvenience to the parents, and the potential for postponing necessary services to the child -- it is necessary to pursue a hearing to establish that the procedure is as important as the result. I mention this situation because the intent is often misunderstood by educators. But I feel it is important to do so.

The other factor which I would like to mention briefly is the consent form and to stress the importance of having forms that are understandable and making sure that parents understand what they are signing. Although I was not personally involved, I have been informed of several occasions where parents thought they were signing an approval of the minutes and instead signed a hearing waiver.

One last point on this stage. It is unclear from the Code what exactly must be included in a letter requesting a hearing. Probably a parent could simply say, "I hereby require a hearing," and it would be sufficient. But I would suggest that the schools provide a hearing request form to parents which contains information about the grounds for the hearing. While such a form could not be used to limit the issues raised at a hearing, it would be useful in stimulating the parents to think through their objections, and

it would provide a hearing officer with a general notion of what the issues are. This would allow some time prior to the hearing to research the issue, which would expedite the decisional process.

G. Hearing

The two primary issues in the hearing stage are hearing process and authority of hearing officer.

The Special Education Code outlines an adequate scheme of procedural rights but does not specify the procedure for the hearing. But several problems may arise, including:

1) Is the school required or allowed to send a representative? If so, who represents or presents the school's position? Can it be an attorney?

2) Which party has the burden of proof?

3) What is the order of presentation of evidence?

4) Can the parents request that witnesses be present only when offering evidence?

The second problem at the hearing stage is what is the authority of the hearing officer in terms of granting relief. It is not clear to me whether the hearing officer is limited to sustaining or rejecting the EPPC recommendation, or if (s)he can fashion a program and order a placement on his/her own initiative, or if the hearing officer is limited to deciding on the issues raised by the parents, of if he/she can order the EPPC to start all over; or prohibit the school from starting another EPPC. Such issues may seem at first glance unimportant, but to the advocate the resolution of such issues is critical for developing strategies for presenting a case or even the more basic issue of deciding the value of initiating a hearing.

## H. Decision by Hearing Officer

The decision by the hearing officer is important to the advocate in terms of a possible appeal. The Code requires the hearing officer to make findings of facts and conclusions of law. Findings of fact include all issues of fact posited by the parties and not just a selected portion of them. This is a difficult task for the hearing officer when there is no established procedure for conducting the hearing, but the obligation to provide finding of facts is clear; and the failure to do so may severely restrict the possibility of effective appeal and should be guarded against.

### Appeal to the State Superintendent

Generally the issues discussed earlier in the context of the local hearing officer apply also to the decision of the state superintendent or his designee. However, an additional concern in the appeal context is which procedure is to be utilized. For some time I assumed that the procedures from Rule 24 were applicable in toto. But Rule 1725 of the Code specifically states that:

> "The deadlines for appeal to and decision by the hearing officer as set forth in Rule 24 shall apply in appeals to the superintendent of public instruction."

My interpretation of this language is that only the deadlines from Rule 24 are applicable and not the procedures. R.349.291 of the Michigan Administrative Rules outlines a comprehensive procedure for hearings by the state superintendent. That procedure conflicts in several respects with the Code. If that procedure is to govern the hearing before the state superintendent, then parents should be notified of that fact so that they may properly prepare for the hearing.

Conclusion

These are some of the issues and concerns that face the advocate. They are by no means the entire scope of special education. Beyond the stage of final appeal to the State Superintendent, there remains the other and more difficult stages of providing the educational services, which is what the procedure is all about. I hope that my attention to the problemmatic aspects of procedures has not obscured the fact that the real issue is quality education for special needs children. Developing good procedural practices, I believe, should serve to refocus our attention upon the quality of those services. I hope that my comments will be of assistance to you in moving towards that goal.

# PARENT INVOLVEMENT IN DIAGNOSTIC TESTING

by

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## PARENT INVOLVEMENT IN DIAGNOSTIC TESTING

Since the passage of PA 198 in Michigan, and especially since the passage of PL 94-142 at the federal level, parents must join professionals in making educational classification and placement decisions about their child. Often, parents have not had a formal opportunity for giving input into the placement and classification process until the latter stages of that process, if not actually the last stage. In all too many instances, the Educational Planning and Placement Committee Meeting (EPPC) is the first opportunity parents have to try to come to mutual decisions with professionals. In this process, parents are at a great disadvantage since: (1) they ordinarily do not know the educational resources available and have limited, if any, first hand observation of their child in the educational setting; and (2) they are not familiar with the psychological testing instruments from which critical classification and placement data are obtained. I would like to argue that it is essential to formally bring parents into the process long before the final decision-making meeting, and I will suggest that an optimal time for parent involvement is in the actual diagnostic testing itself.

In order to talk about my models of family involvement in a child "diagnosis-classification-placement" process it is first necessary to review some familiar concepts of standardized testing. Standardized testing necessitates a controlled testing context: for example, the room, materials, order of presentation, and examiner instructions are uniformly prescribed. With the testing context held constant, variations in child performance should ideally be attributable to differential responses to specific test items mediated by differential intellective-cognitive abilities. There is, however, much evidence indicating that children vary tremendously in their reactions to the

standardized testing situation itself, and that these differential responses, based on experiential, emotional, and motivational differences, affect performance outcome on test items. In addition, the individual child is a stimulus with tremendous demand characteristics who impacts differentially on different diagnosticians, despite the diagnostician's attempts to adhere to the standardized "script." The testing situation is, therefore, a complicated interaction between a child who brings unique experiences, expectations, and responses and a diagnostic examiner who also brings unique experiences, expectations and responses. The test is a tool around which this very complicated interaction takes place. Also, the tools themselves (different tests and test items) change the context of the interaction. The diagnostician's very difficult problem is to figure out <u>why</u> the child performed the way he or she did in this very complicated situation.

Standardized testing is traditionally designed to minimize the impact of the individual differences of examiner and child. It is my opinion that we should try to maximize these factors to learn more about an individual child. This involves spontaneously changing the standardized testing routine to orchestrate new interactions with the child in response to the ongoing dialogue between the participants. In other words, in order to understand the individual child we have to capitalize on these individual differences. By using our own emotional and immediate reactions to the child we can utilize the ongoing situation to bring out these factors more clearly. This involves the diagnostician more personally and actively in the diagnostic relationship, and this type of active involvement carries some personal risks to the professional. For example, if you have a test with a set "script," it tells you how to "be" with the child,

and this is comfortable to us. This is particularly true when the children that we may be asked to "be with" do not respond to us in ways we might expect (e.g., they may be antagonistic, unresponsive or uncooperative). The set testing routine gives us something to do and a way of feeling competent despite the puzzling responses from the child. This reliance on the tool often obscures the diagnostician's conceptions and understanding of the unique aspects of that particular interaction.

In summary, to be responsive to the uniqueness of each particular interaction, the diagnostician must be ready to vary the standardized testing routine. The testing situation, therefore, becomes a "non-standardized" use of a standardized test[1]. All diagnosticians engage in this behavior to some degree, but most diagnosticians have not, in my opinion, internalized a notion of non-standardized testing as the major diagnostic role in their attempts at understanding the individual child. The American Psychological Association, the American Education Research Association, and the National Council of Measurement in Education have stated in professional guidelines that, in order to understand the individual case, a diagnostic examiner may not have to rigidly follow testing procedures and would probably have to embellish them. More strongly, they have stated that the exploration of an individual case is different than standardized testing. While there is much in the way of specific guidelines for standardized norm-referenced testing, there is very little in the way of guidelines for non-standardized testing needed to understand the individual case. The diagnostician who is most often called upon to test the individual rather than to collect group norms is, therefore, left to his or her clinical intuition.

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[1]This will be referred to simply as non-standardized testing for the remainder of this presentation.

Within a framework of non-standardized testing, the introduction of parents into the diagnostic testing context as observers is seen as one viable means of changing the diagnostic context to enhance the study of the individual child. The potential gains from family observation of the testing process include the following: (1) Parents become exposed to and more familiar with the instruments by which classification and placement decisions are made for their child. This has obvious due process implications. Furthermore, they have a chance, on the spot, to add interpretations or clarifications, from their point of view, that may aid the diagnostician in formulating a more accurate appraisal of the significance and meaning of the child's performance in the testing situation. (2) By comparing perceptions of a shared event (i.e., the diagnostic testing) the diagnostician is in a better position to understand the family milieu which has shaped the expectations and the emotional and motivational sets of this child. (3) A meaningful dialogue is started between the professional and parent around a shared concrete event which should enhance the ability of both parties to better understand the viewpoint of "others", and to lead to more comfortable and productive communication between parent and professional in the more formal vehicle of interaction, such as the Educational Planning and Placement Committee meetings.

Another model of family involvement includes the active participation of parents in testing of their own children. In my own work, I have developed and refined tasks and instruments appropriate for parental administration. In addition to the above-mentioned gains from parental observation of the diagnostic process, parental testing of their own children gives the diagnostician an opportunity to directly observe sequences of parent-child interactions around learning and performance items. For many children, particularly those

children with significant developmental problems, we have found that parent testing tends to optimize child performance. With some families, however, parental testing interfers with optimal child performance. Under these circumstances, parental testing of their own children does allow the diagnostician an opportunity not only for better understanding of the nature of maladaptive parent-child interaction,but also for immediate intervention in the form of corrective instruction and/or modeling.

I am currently working with a third model of family involvement in which families and their children go through an initial diagnostic procedure without a diagnostician actually being present. Having carefully and systematically developed procedures which allow families to comfortably and productively carry on diagnostic activities on their own, we are ~~not~~ new in the position to systematically assess the impact of the presence or absence of the diagnostician on the quantity and quality of the initial diagnostic data. Although this model is obviously a research model focusing on the clinical process, it has some implications for practical diagnostic work. For example, our initial study has documented the competence and insight with which family members are able to carry out their diagnostic tasks. It is my opinion that often times typical diagnostic procedures do not allow families and their children to show their competencies. Most often the diagnostician is led to believe that it is his skillful probing that has led to insightful responses from the parents and children. Unfortunately, the traditional diagnostic process puts the families into a passive position vis-á-vis that of the diagnostician. Surprisingly, families have described the "automated" diagnostic model in which no diagnostician is present as a more "personal" and "giving" experience than

their previous diagnostic experiences. The diagnostician must, therefore, examine the ways in which routine diagnostic processes can be restructured to acknowledge family competencies and to encourage their expression.

The models presented may not, at first glance, appear to have direct applicability to problems of diagnosis in the schools. I believe, however, that my experiences and findings, even though they are from a different setting than that of the school diagnostician, can be used as a starting point for some creative thinking and that is the purpose of the ensuing discussion period.

QUESTION:

Does not every diagnostician, after learning the rudiments of test administration, engage in non-standardized testing? What is new about what you are saying?

RESPONSE:

What guidelines does the individual diagnostician have for answering questions such as, "How far do I go? How much can I vary this test? How do I vary this situation systematically so that I can properly assess its impact? I feel that diagnosticians "play down" this element of their performance perhaps partly because there are no clear professional guidelines for these activities.

QUESTION:

How do you report your non-standardized testing results?

RESPONSE:

In a testing report I might say something like the following: "In an informal presentation of the Leiter International Performance Scale by his mother, Johnny performed approximately at a mental age equivalent of five years of age." Thus, I have qualified the findings on several

accounts, and clarified the context under which the testing was conducted.

QUESTION:

I would be concerned from the point of view that you later have parents that attempt to teach the children tests and become very concerned about those items.

RESPONSE:

This is something about which to be concerned. Hopefully, the process of interaction between professional and parent will encourage the expression of parental anxieties so that they can be handled. I have had parents ask to come back and repeat the testing. This may reflect an inappropriate anxiety but sometimes it might be quite appropriate. For example, sometimes parents are sensitively attuned to the internal physiological environment of their child which, often times, can affect performance. Parents may be very accurate in suggesting that testing at another time could yield different results. On the other hand, parental concerns may reflect underlying anxiety, and the diagnostician has the obligation to confront these concerns to help parents reassess their own perspectives. The diagnostician must be willing and able to deal with the possible reactions people might have in response to involvement during the diagnostic process.

QUESTION:

What types of children or families would be most appropriate for these models? Why haven't you considered asking the children if they wanted their parents present, and asking parents if they wish to observe, let alone participate, with their child?

RESPONSE:

This methodology might be particularly helpful in the case in which you know in advance that there are differential perceptions of the child's problem: this might involve different perspectives between parents and the school personnel or differential perception between family members.

I don't ask the participants to decide if they wish to participate in this activity. I strongly recommend their participation in the activity for, on the basis of my experience, this has been a positive experience for most parents and children. It may be, for example, exactly the parent who says he or she wishes not to observe the child participate in the diagnostic interaction who could most benefit from observing directly the child's difficulties.

One thing I want to mention is the importance of instructing and preparing all parents carefully for their role in observing or partaking in the diagnostic process. I try to explain to families exactly what we will be doing and why. I point out to parents that they have good information about their child, that they live with that child and are experts in their own milieu. We try to make the parents feel that they are in control and really have something to give. Further, I try to prepare them specifically for the observer role. We talk about things they might look for. Often times, we try to have someone sit with the parents (if they are watching) to discuss with them their reactions to the ongoing diagnostic situation. I have prepared written observation guides to help parents as they are watching the testing, particularly for times when there is no professional watching with them. The same type of

preparation is done for parents who take an active role in the diagnostic process by testing or interacting with their child. Carefully formulated instruction booklets, instructional video tapes, colored photographs and diagrams are put together to help the parent to perform comfortably and competently in that role.

QUESTION:

What if the parent gets upset and leaves the situation?

RESPONSE:

If so, a process has occurred which is reflective, in part, of the child's reality,and you have a chance to deal with that right there: to deal with the child's response and his perception of the events as well as the parent's response and their perception of it. (this of course hinges on whether you can get the parent to come back and talk about how upset or angry he/she was at what happened.) Now, if you have limited time and specified assignments to get data and this type of disruption happens, I realize that it would be disturbing for you in your role in the system. It is important to keep in mind, however, that the most valuable learning experience for the child occur when his/her own parents are anxious (e.g., when the parents do <u>not</u> know what to do). Most parents feel that they should know what to do,but there are times of course when they do not. How parents translate their anxiety and model ways of handling that anxiety is a critical factor in understanding the child's personality and performance. The diagnostician has an opportunity to intervene, perhaps beginning with a statement such as: "I see you are nervous about what has happened but, you know, it is good for a parent and child to work out some of these things together."

QUESTION:

What about the child's concern about failing in front of his or her parents?

RESPONSE (from an audience member):

But this is not the only time the child in under pressure in front of his/her parents.

QUESTION:

It seems that we never hit the parents that need this kind of service the most. It becomes a natural selection process of getting those parents that are willing and able to come in. Sometimes you are lucky if you can even get parents to the EPPC meeting at the end. Which parents do you end up working with?

RESPONSE:

You can try to reach out to the parents who don't appear willing or able to come in. I have done non-standardized testing in people's kitchens in order to involve the parents. If you can strike a rapport around something concrete and real to them, perhaps you can get more interest and motivation to come and participate in the school process.

Also, don't underestimate the telephone as a means of gaining parental rapport and interest. I have carried out "long-distance" telephone relationships over periods of months with families who were not cooperating with schools and other social agencies, and this led to some degree of increased cooperation.

Finally, the growing availability of videotaping capacities in the school system is a significant factor. Videotaped segments of testing interactions, classroom behaviors, etc., can be shown at an EPPC meeting

to give parents and professionals concrete data on which to share perceptions and engage in more mutual problem solving.

QUESTION:

What you are talking about is really interesting. We have teams, people that would include a social worker, psychologist, and teachers. People whose roles are overlapping. Have you ever thought about that? Here we have three people that may be working with the same parents, and I am wondering if the model would hold true? Would it facilitate or impair team communication?

RESPONSE:

Again, if you are lucky enough to have videotaping available, I think team communication is enhanced. People perform differently in different contexts,and this can lead to "battles" in which a teacher describes one kind of behavior, the parent another, the social worker another, and the psychologist still another. Often it is hard for people to feel comfortable when others offer differing perspectives,and this can lead to divisiveness rather than mutuality. Sharing differing contexts and experiences through the concrete medium of videotape can lead to more mutuality.

QUESTION:

I don't think that answers the question the way I understood the question because the problem still remains: <u>each</u> team member is expected to bring something to the evaluation. For example, as a school psychologist I may have some contact with parents,but the social worker on the case has more parent contact than I do because of time and role definition. So I am dependent upon the observations of the social worker. I trust my social

worker, but her conception is still not my conception. Yet I believe in team concepts. How does this difficulty fit into your models?

RESPONSE:

Two people can engage in a similar activity, for example, interviewing parents, and have very dissimilar interpretations. This is not necessarily bad,nor does it mean one person is more correct than another. Different personalities from differing role perspectives are bringing different facets of a complex situation to light. Different team members also elicit something different from the parents who respond to the different personality and professional perspective of the interviewers. Furthermore, summary descriptions, written or verbal, do not usually describe the situation fully enough to allow someone else to independently judge another's experience. When someone describes a situation,it is appropriate to wonder how that person is influencing the outcome or conclusion. This isn't simply a matter of lack of trust. Shared common experiences can help professionals sort out these differences. Videotape viewing of a concrete experience isn't the sole answer to problems of team functioning, but it does have the possibility of efficiently facilitating team communication.

QUESTION:

Aren't the extremes you have presented really beyond what it possible in the schools?

RESPONSE:

I would like to argue that the minimal parental involvement required in diagnostic testing that leads to placement and classification decisions

should be observation of that testing. This could be "live" or later in viewing videotaped segments. I have spoken earlier of the due process implications of this. Further, I think parental reactions to and interpretations of the testing ought to be incorporated into the testing report.

Obviously, however, many people would not agree with me, and that is fine . . . I am trying to encourage debate. There is, on the other hand, something that cuts across all that I have said that is important for all of us. It is my hope that my descriptions of my experiences with families in situations which you may never encounter, will give you more positive expectations that parents do have a lot of strengths that may not be as readily evident within the constraints of the school diagnostic situation.

Diagnosticians are often called upon when there is an existing conflict between parent and school, and the diagnostician, as a representative of the school, feels a pressure to change parental perceptions. This is not a good way to start out with anybody. People need a climate of interest, acceptance and understanding before productive and difficult change can take place. No matter what the constraints of our individual systems, we can all work at changing and improving our attitudes: (1) our attitudes toward our clients, including our ability to identify with and respect them; and (2) our attitudes toward our own professional roles, particularly our ability to share what we <u>don't</u> know, as well as what we do know, and to use ourselves as our most important tool in human interactions.

# PARENT CONSULTATION: A HEALING PROCESS

by

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PARENT CONSULTATION: A HEALING PROCESS

When we are with parents, the message we impart to them depends on our own "state of grace" so to speak. It depends on where our heads are. I am afraid that this does not have a lot to do with our professional training. It has more to do with our healing strength. Although healing strength can be channelled through professional processes, I do not think it is very dependent upon professional process. In fact, if you use the professional process as most of us do, as a defense to hide behind, then it can become anti-healing.

No one teaches us or warns us against using our roles and skills of professionalism as shields against exposure and disclosure. In our daily practice no one beams back to us when we retreat behind our test results and test protocols to cover our uncertainty in front of the parents, our fear of the parents, or our dismay over the emotions we feel inside ourselves. Sometimes the emotions are anger at the people in front of us, sometimes it is terror, sometimes it is lust, sometimes it is alienation or boredom or irritability at their intrusion or interference with our daily routine or our own internal fantasies.

None of these feelings have anything to do with our instruments or our special technical measures we employ with the child or the parents; and yet all of them send out cryptic, garbled signals to the people before us. Of course, they are frequently confused by what does come across. They have been enculturated just as we are into our professional role, and they make some of the same assumptions we do about this role. As they sit before us or next to us, many of their own feelings and emotions are attached to this enculturation. Nevertheless, the other reality we are experiencing inside

ourselves does escape through this professional screen. Without full conscious awareness, they pick them up and are affected by them. What they do then, I think, is to fold these multi-waved signals into their own internal experiential reactions and meld the whole into a strange melange.

They do not know how much of what they experience is coming from inside themselves and how much is coming from outside. They see your professional mask and assume it is you. They tune in and give reciprocal output to you, but, because of the strength of the professional illusion, they assume they are making the appropriate parent reactions to your psychology-framed messages.

I used two unusual terms -- "state of grace" and "healing strength" that are completely outside the lexicon of existing theoretical models such as behavioral, analytic, or ecological theories. I did it deliberately to break us out of our models and get us back to the phenomenology of experience in parent consultation interchanges. I am serious about both phenomenological areas. Where we are inside ourselves is terribly important to the healing art.

When I say "grace" I am not talking about a state of perfection ... the Greek idea of the perfect man ... perfect in righteousness, perfect in mind, perfect in body, etc. I do not want to add to the pile of crap that has been poured on top of us by our professional writers, philosophers, theorists ... I do not believe in perfection. That is why it is so difficult for me to be part of a professional body that pursues the public's impossible fantasy that they are perfect, and all the ones we deal with are imperfect and that, through psychotherapy, behavior modification, desensitization, megavitamin therapy, etc. we will make them perfect. I do not believe in such cultural illusions.

However, when I talk about a state of grace I am talking about a psychical state within ourselves which comes about only after long inner explorations, after some awareness of how closely we are kin to the people we say we are studying. A state of grace is a sense of liberation, even though only for brief moments, from the false beliefs and myths of our culture about how people ought to be if they are normal. It is a sense of being able to penetrate the social barriers that keep each of us insulated from the others. It is a sense of being able to get behind what the parent or child sitting opposite you is doing and saying, and connecting it at a clearer, less opaque level with what is happening inside of them. In many instances, some of us have had those peak experiences when the person sitting opposite us has helped us transport outside our everyday selves, when we feel good and full and happy ... not orgiastically ... but serenely happy in sharing a moment in time with someone else who can do to us what a sunset can, or a dancing glint on a brilliant sea, or a gurgling brook.

The state of grace I am talking about, however, is not a single state ... not just the blissful state I just described; although when we experience that we know that we are capable of grace. There are other times with other people, other parents, that we can feel the storms of their inner violence and it too can be transporting like a wild night of lightning and thunder and darkness all booming at once around us. And at such times we can also be <u>one</u> with the person who stands in the healing center with us.

Lest I confuse you with the idea that parent consultation is a matter of being lost in the other, and the feelings and meanings of the other, I know that it is also very important to distinguish between the me and the thee.

one of the most difficult things we have to get across to parents is that their flesh ends and their child begins; that they do not have to go all through their schoolhood selves again in the body of the child. And so if we are truly approaching them as healer, then we must model for them that we are not they, even though we can stand in the moment with them and experience it as they do.

We must not get locked into their feelings to the point where we cannot provide the white-hot searing truth about their child no matter how desperate their need may seem to be not to know, not to be undeceived. We can experience the pain that they would experience if we came straight to the heart of the matter and gave them fully what we see in their child. We cannot at such a moment feel their feelings to the point that we cannot face the truth together ... or that we cannot experience the loneliness of their anger at us for disillusioning them, at not presenting them the possibility of perfection for their son or daughter.

Nor can we afford to be afraid because of litigation, because of the potential destruction capacity in the parent to kill the bearer of the message.

Because the truth, even when overwhelming, can also be healing. Such healing lies not only in their exposure, but also in our own. When we back away from the truth because of its dangers, we back away from ourselves and come away feeling diminished in ourselves. That is a reality greater than the reality that we can be hurt by the truth in very direct social ways.

All of us know the politics of care and caregiving. Professionalism is every bit as much a political process as it is a professional process. In

fact, I am convinced that there is very little differentiation between what we call professional and what is political. Therefore, in our own communication, in the social waters we swim in, we are subjected to the currents of political forces. We know that, and are influenced by that. But at the moment of confrontation with the parent it is important to put aside our rational appraisal of the political nature of the exchange ... we must free ourselves of the grip of the political vice we're in and bathe only in the healing forces. We deliberately bracket out the political from the exchange of healing.

The state of grace is an irrational state and therefore, because of cultural overlay, a dangerous state. Our society fears irrationality. It fears those who slip out of the culture. Society shuns our clients because of their lack of the requisite amounts of rationality or their inability to hide their irrationality, whether this is the irrationality called retarded or the irrationality called emotionally impaired. Since the great Enlightenment, the culture has denied us our irrational selves and our irrational brothers and sisters. The state of grace is an irrational state which sweeps us away from the learned reality that all the others share. It is the craziness of love ... a limbo state.

Parents are afraid of us when we are in this state because we are so much like their children. They know that society does not approve of their children, and therefore does not approve of them for not pulling their children into the pattern that culture demands. They know that their children invalidate the cultural illusion of perfection and perfectability and that they are held liable. They are trying to reclaim their children and thus reclaim the cultural mantle for themselves.

When we brush aside the culture and talk to them about who they are and who their children are without the facade of culture or the fantasies of culture, we are a great threat. When we stop pretending that there is perfectability and that we can open the gates of perfectability to their children, we are a searing truth that is hard for them to bear.

But if we talk straight with them, without the interference of this mythical reality of perfectability, we can get to that part of them which really knows, as painful as the knowing may be. They may attack or defend. They may wring their hands or retreat as though in defeat. But they carry the truth away with them in a way that was not there before; and it has a way of growing inside of them.

It is terribly important what state we are in when we tell them about their child and themselves. We must be able to deal with our own inner selves so that we are not afraid, not angry, not vulnerable ... but are clear and untroubled about the truth.

And after all, part of the truth about their children and also themselves, is that they do not follow the perscribed rules for rationality. What happens to them is an object lesson for all those who invalidate the shared fantasies and images which the culture has about itself. Society does not want to know that man is irrational above all ... at least Western Society does not. The shared illusion is that Western man is a rational man; and if not, then by dint of will power and cultural intervention he can be made rational. One of the demands this society places on us is to help it locate and rationalize the occasional member who may have slipped by and is living in an irrational state ... either as non-intellectual -- retarded -- or as rational-deranged -- emotionally disturbed.

The myth is that all the rest of us are rational. We join in the myth and deny that we are irrational. And the myth within the myth is that when we slip into irrationality, it is only a temporary fall from grace. And anyway, man is on the road to rational perfection through science and education.

To be a healer we have to face the myth. And when we are in a state of grace we are fully aware of the myth. The reason this is a dangerous state is because it alienates us from the culture. To be in a state of grace is to fall out of the culture and run the risk of calling to the attention of the culture that you have slipped out of its orbit ... and you know what has happened to your clients who are society's object lesson.

Nevertheless, this is truth; and you deal in truth. You need to tell your client and their parents the truths about themselves; and to yourself the truth about the culture you inhabit. And if you work with your clients over time you need to teach them the truth about the culture, so they can begin to separate out what part of the mess they're in lies in them, and what part is in the culture. That's the shaky ground you walk on as a psychologist.

As for the school, it is an instrument of the culture ... and as a cultural instrument it not only transmits knowledge and enhances growth, but it also transmits the lies of the culture. Each culture has its own brand. Ours is that people can be perfect ... not only the ones who deceive by outward appearance, but all people. And further, the psychologist was some sort of magic to bring this about.

One of the things we have to be careful about is not to get caught up in this cultural illusion and make such demands upon ourselves. We cannot make people perfect, nor can we tell the schools how to do this. That doesn't mean we can't heal people ... at least in terms of what they think about themselves or their children because they are perfect. It does mean that

we do not get caught up on the crazy expectations of either the school or the surrounding community.

They need us ... they need us as transducers, as go-betweens who can keep the fright of differences in controllable bounds and who can interpret the frightening ones to them. They need us also because we transform their feelings about their fear of their own likeness to our clients into a sense of normality and reasonableness. And above all, they need assurance of their own normality because our culture tells such lies about what it is; and the schools are a place in which the lies are supposed to be transformed into reality.

# LEGAL ISSUES FACED BY SCHOOL PSYCHOLOGISTS REGARDING HANDICAPPED CHILDREN[1]

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[1]This paper was prepared as background information for conference participants.

LEGAL ISSUES FACED BY SCHOOL PSYCHOLOGISTS

REGARDING HANDICAPPED CHILDREN

## Preface

The growing concern over individual rights, and particularly the rights of "special education children" has created a situation which may have a significant effect on the role and function of the school psychologist. It is imperative that the school psychologist become familiar with recent legal trends, current litigation and the likely direction that the courts will take. The school psychologist has the rare opportunity to effect change in the legal system by his or her actions. A re-direction of his/her energies into new areas may serve to influence the path of the courts. This re-direction has become critical. Unless certain steps are taken, there is the strong possibility that the courts and state governments will step in and supervise many of the changes that are currently being demanded.

A solid understanding of the legal issues and their likely direction will help the school psychologist to plan and modify his or her practice. He/she also has the opportunity to influence the practice of the schools in order to comport with the law and likely court decisions.

This paper offers a cursory review of relevant legal cases. The issues, plaintiff's arguments, legal arguments and the implications for school psychologists are presented. One can draw his/her own conclusions as to the "wave of the future."

## Testing, Labeling and Placement

Standardized tests have undergone careful scrutiny over the past two decades. Issues of reliability, validity, cultural bias, and racial discrimination have all become part of the school psychologists profession. Parent groups, civil liberty organizations, and child advocates have all, at one time or another, called into question the violation of basic rights by the administration and use of standardized tests.

Several landmark cases point up the uncertainty of the courts in dealing with the relevant issues. Concurrently, parallel issues involving labeling and placement have come to the forefront. Litigation has forced the courts to consider the legality of many heretofore routine practices of educational systems. Scrutiny of the practices of state educational systems by the courts has resulted in the isolation of several critical issues. An understanding of these issues, along with some background of legal trends, are critical to the school psychologists. Insight into the implications for educational practice of legal decisions, legislative statutes and potential state education departments' mandates are critical.

## Issues and Arguments in Testing, Labeling, and Placement

The issues and arguments that follow have been derived from the cases in the appendix. The court, in the cited cases, has either directly affirmed or alluded to the specific issue or argument.

Issue One: Educational testing used by the schools does not accurately measure the learning ability of the child. (See: Hobson v. Hansen; Mills, et al. v. Board of Education of the District of Columbia, et al. ; Guadalupe v. Tempi Elementary School District; Diana v. State Board of Education; Covarrubias v. San Diego Unified School District; Larry P. v. Riles; Stewart v. Phillips)

Arguments:

1. Cultural bias due to norm reference, nature of items, nature of testing environment results in misclassification and inappropriate educational placement of members of minority groups.

2. Placement decisions are based solely on the above criteria.

3. There is implied discrimination due to language deficiency for non English speaking youngsters.

4. Standardized tests measure only a small part of child's repertoire of behavior.

Issue Two: The administration and interpretation of standardized tests is performed incompetently. (See: Hobson v. Hansen; Guadalupe v. Tempi Elementary School District; Diana v. State Board of Education; Larry P. v. Riles)

Arguments:

1. Standardized test administrator does not take student's cultural background into account.

2. Child may have difficulty understanding test item if administrator speaks in a language or dialect different from child's native one.

3. Training in test administration may be inadequate.

4. Test administrator fails to take into account variability in test taker's performance.

5. All of these factors may lead to a level of performance by the test taker which does not accurately reflect underlying competence.

Issue Three: Parents are not given adequate opportunity to participate in the placement decision. (See: Merriken v. Cressman; Covarrubias V. San Diego School District; Stewart v. Phillips; P.A.R.C. v. Commonwealth of Pennsylvania)

Arguments:

1. Parent may have knowledge of child's behavior, aptitude, motivation and skill development which could contribute valuable data.

2. Parents are given inadequate information to arrive at a sound decision for the child's placement.

Issue Four: The possibility of a self-fulfilling prophecy for children placed in "special education classes" and labeled accordingly. (See: Hobson v. Hansen; Mills v. Board of Education; Merriken v. Cressman)

Arguments:

1. A child may achieve at the level he or she is expected to achieve.

2. The stigma of a label may contribute to performance as a result of the stigma.

3. Classification may define a child's role and status.

Issue Five: The use of certain tests imposes an invasion of privacy. (See Merriken v. Cressman)

Arguments:

1. Many tests include personal questions relating to the home and are given without parental permission.

2. Many tests include questions about peers and peer relationships.

3. Many tests include questions which have no educational relevance.

## Right to Equal Educational Opportunity and Right to Treatment

Law suits concerning the right to equal educational opportunity have been prevalent since the landmark rulings in Pennsylvania Association for Retarded Children v. State of Pennsylvania and Mills v. Board of Education of the District of Columbia. ("Access to Education" suits similar to Mills and PARC have been initiated in at least 22 other states.) Both cases were settled in 1972. It was explicitly delineated that the mentally retarded had the right to education and this right must be upheld regardless of financial considerations.

Furthermore, Pennsylvania acknowledged its responsibility to provide a free public program of education for all its children. It agreed to place each mentally retarded child in a "free public program of education and training appropriate to the child's capacity." In Mills the court guaranteed the right to a publicly supported education. However, the court also acknowledged that a lack of fair assessment and placement procedures had resulted in exclusion or misclassification. The court ordered many safeguards against further exclusion or misclassification and demanded a periodic review of a child's placement.

Two additonal issues regarding the rights of the mentally retarded were raised in LeBanks v. Spears. The court, by consent order, decreed a free public education for all but insisted that the education be oriented toward the goal of self-sufficiency and employability. In addition, it was agreed that educational opportunities be provided to mentally retarded who were not given educational services as children.

Although a great deal of legislation and litigation has been devoted to the right to equal educational opportunity, the legal implications of right to treatment are only recently emerging. The concept of right to treatment raises issues about the role of the school in serving all of the needs of the

handicapped. The two most significant cases in this area are Wyatt v. Stickney and New York Association of Retarded Citizens v. Rockefeller. Among other findings, the cases point out the necessity for individualized treatment programs to take place in the least restrictive environment.

Another critical factor is the major concern of citizens over the time lag between adoption of a legal principle and its implementation. In Harrison v. Michigan, the court refused to hear the case because of the remedy available legislatively.

The courts have demonstrated an inconsistency in ruling on the rights of equal educational opportunity and right to treatment. The courts have also raised serious questions about the actions of the school, the role of the parent, and the rights of the handicapped individuals. In light of these factors, it is critical that the school psychologist continues to be aware of the trends in litigation governing the rights of handicapped people.

Issues and Arguments in Right to Equal Educational Opportunity and Right to Treatment

The issues and arguments that follow have been derived from the cases in the appendix. The court, in the cited cases, has either directly affirmed or alluded to the specific issue or argument.

Issue One: Countless children who are classified mentally retarded, mentally ill, learning disabled or neurologically impaired are excluded from school. (See: Mills v. Board of Education; P.A.R.C. v. Pennsylvania; Lebanks v. Spears)

Arguments:

1. Children are being suspended and excluded for disciplinary reasons. Many of these children have difficulty behaving through no fault of their own.

2. Children are excluded because the public school refuses to establish learning environments suitable to the "special child's" needs.

3. Children are excluded who do not fit into any of the neatly defined parameters of a particular learning environment. This leaves parents with the option of institutionalizing or paying for private care.

Issue Two: The quality of the educational program does not provide handicapped children with an experience which will help them to reach their maximum potential. (See: Wyatt v. Stickney; Stewart v. Phillips; Lebanks v. Spears; Hobson v. Hansen; Mills v. Board of Education)

Arguments:

1. Handicapped children are often misclassified and provided with an inappropriate education.

2. Situations exist which encourage non-attendance by handicapped children.

3. Very few individualized programs are suited to the needs and designed to maximize the capabilities of each particular child.

4. Placement in special educational programs are not reviewed periodically

to determine whether or not the program has accomplished the specific objectives which were outlined in the individualized program plan.

Issue Three: The disproportion of minority students in "special education" classes implies certain factors about the minority. (See: Larry P. v. Riles; Mills v. Board of Education; Guadalupe v. Tempi Elementary School District)

Arguments:

1. The presumption against a racial imbalance puts pressure on school officials to prove relevance of screening and assignment criteria.

2. The right to education includes right to remediation. There is an obligation to meet the needs of the children who come to school undernourished, understimulated and undermotivated.

Issue Four: The rights of the child are violated by placement into a special class which does not offer adequate treatment. (See: Wyatt v. Stickney; Ricci v. Greenblatt; N.A.R.C. v. Rockefeller)

Arguments:

1. The stigma of placement is accepted if adequate treatment is offered in exchange.

2. The concept of fundamental fairness implies proper placement and adequate treatment.

3. Special education programs should be provided in the least restrictive and denormalizing environment possible so that each child is educated in a setting as close to the normal classroom as possible.

4. Due process protection requires that every special educational placement, denial of placement, and transfer must be preceded by constitutionally adequate notice and hearing procedures.

Issue Five: Special education programming is inadequate and placement into these classrooms causes irreperable harm. (See: Diana v. State Board of Education; Merriken v. Cressman; Mills v. Board of Education; Hobson v. Hansen; P.A.R.C. v. Pennsylvania; Larry P. v. Riles; Guadalupe v. Tempi Elementary School District)

Arguments:

1. Special education classes become burial grounds since regular reevaluations are not done.

2. Stigma attached to label of "special education," "mentally retarded," and so on.

3. Child's future is necessarily limited by education available.

4. Potential harm by misclassification is tragic because the mildly impaired have considerable learning capacity and strength in adaptability.

Issue Six: The education of handicapped children is the responsibility of the state. (See: Lebanks v. Spears; P.A.R.C. v. Pennsylvania; Mills v. Board of Education; N.A.R.C. v. Rockefeller)

Arguments:

1. Many parents cannot afford the cost of private institutionalization.

2. Since the State mandates education for all, the State should be obligated for the incurred expenses in evaluation, intervention, and transportation.

Issue Seven: Institutional settings are not providing adequate treatment to those it confines. (See: Ricci v. Greenblatt; Wyatt v. Stickney; N.A.R.C. v. Rockefeller)

Arguments:

1. Confinement of handicapped children is borne out of humane statutes intended to insure adequate treatment. Any confinement without adequate treatment violates children's rights.

2. Confinement without adequate treatment is indistinguishable from penal confinement.

3. The conditions in institutional settings may constitute cruel and unusual punishment.

## Implications of Litigation for Educational Practice

The implications listed below are derived from the cited cases. However, for the most part, they are not explicitly contained in the court's decision or consent agreement. The implications serve to establish possible trends in the case law. They are drawn from statements made by the judges, but not necessarily grounded in the law. The eventual direction that the courts take in decisions involving testing, labeling, placement and rights to education and treatment will determine the validity of the implications.

1. If the court were to hold that the administration of intelligence tests, by English speaking testers,to children,whose primary language was something other than English, was a violation of equal protection, then the testers would have to be bilingual. (See: Diana, Guadalupe, Covarrubias)

2. If the court determines that there is a self-fulfilling prophecy with regard to placement, then labeling may be declared unconstitutional under the right of equal protection of the laws. (See: Hobson, Mills, Merriken)

3. If the court determines that the use of standardized tests as the sole basis for placement decisions violates due process or equal protection rights, there use may no longer be permissible. (See: Diana, Stewart, Larry P.)

4. If the court finds that the asking of personal questions, of students, about their family background and upbringing are an invasion of privacy, then schools will be forced to turn to parents for the answers to these questions. This will be necessary in order to make fair and appropriate placement decisions. (See: Stewart, Guadalupe, Merriken)

5. If the court finds present classification procedures to be in violation of equal protection then any or all of the following may be required before classification is permitted :

a. psychiatric indicators of 'true' aptitude and achievement level;

b. medical and socioeconomic background data;

c. complete teacher's report;

d. adoptive behavior data;

e. level of motivation;

f. learning styles, language skills and interpretation skills;

g. behavior patterns that exist between child and his family; and

h. observation of child by trained personnel of school behavior.

(See: Diana, Stewart, Guadalupe, Larry P., Mills, Ricci)

6. If the court insists on informed consent of the parents before placement, then school representatives will have to advise parents of all the potential deleterious effects in a "special education" placement. These would include stigma, lack of stimulation, nature of peer group, self-fulfilling prophecy and possibility of limited future. (See: Hobson, Larry P., Merriken)

7. If the court insists on informed consent by the parents before placement, then it may require a hearing before placement with a private independent agency. (See: Mills, Covarrubias, Lebanks)

8. If the court finds that inadequate special education programming was violation of equal protection then it may force schools to integrate special education children into regular classrooms. (See: Stewart, Guadalupe, Mills)

9. If the court finds that failure to reevaluate placement periodically is a violation of equal protection, it will insist that each child placed in a "special education class" be reassessed periodically to determine growth and possibility for a change in placement. The precedent for this has been established by the passage of PL 94-142.

## Summary of the Significant Aspects of The Education of all Handicapped Children Act of 1975 (PL 94-142)

It is important to note that much of the present legislation, including this Act, has been a response to current litigation. This Act may serve to be a fundamental charter for future litigation in the area of rights of the handicapped.

1. The Act greatly increases the authorized level of Federal funds for special education. It requires states receiving such funds to provide a "free and appropriate" public education to all handicapped children within the state by September 1, 1980.

2. In order to receive Federal funds the states must have a policy for educating all handicapped children between the ages of 3 and 18 by September 1, 1978 and all those between 3 and 21 by September 1, 1980. (Children between 3 and 5 may be excluded, depending on the state law or practice).

3. There are due process procedures for identification, evaluation and placement of handicapped children. These procedures are required to assure that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children occurs only when education in regular classes with supplementary services cannot be achieved.

4. The Act requires procedures to ensure that education and placement is accomplished without racial or cultural discrimination.

5. Evaluation and testing is to be done in child's native language or mode of communication, unless it is clearly not feasible to do so.

6. The Act provides that "No single procedure shall be the sole criterion

for determining an appropriate educational program for a child."

7. The current definition of "handicapped children" includes children who are mentally retarded, seriously emotionally disturbed, learning disabled, as well as children with a wide range of physical handicaps.

## Hobson v. Hansen 269 F. Supp. 401 (1967)

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| Court: | U.S. District Court, District of Columbia |
| Plaintiffs: | Class action brought on behalf of Black school children in Washington, D.C.. |
| Defendants: | Hansen - School Superintendent, and other school officials |
| Factual Issues Involved: | 1. Whether the Stanford Achievement test and the Otis Test of Mental Ability were culturally biased.<br><br>2. Tracking led to unequal educational opportunities. |
| Harm Alleged to be Suffered: | Irreparable injury suffered by plaintiffs through inadequate education. |
| Results: | 1. The tracking system was abolished. "The tracking system discriminates against the disadvantaged child..... it has survived to stigmatize the disadvantaged child of whatever race relegated to its lower tracks - from which tracks the possibility of switching upward, because of the absence of compensatory education is remote."<br><br>2. The defendants were permanently enjoined from discriminating on the basis of racial or economic status. The placement within tracks are based on standardized aptitude tests which are completely inappropriate for use with a large segment of the student body. These tests are norm-referenced on white middle class groups. "As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or - more precisely - according to environmental and psychological factors which have nothing to do with innate ability." |
| Comments: | The significance of Hobson v. Hansen has to do with the court's reaction to Standardized Testing. It touches on issues of cultural bias and racial discrimination in regard to the instrument and its use for placement and tracking.<br><br>The critical feature of Hobson v. Hansen is expressed by the judge. Judge Skelly Wright wrote, in his opinion:<br><br>> The real tragedy of misjudgments about the disadvantaged students' abilities is...the likelihood that the student will act out the judgment and confirm it by achieving only at the expected level. Indeed, it may even be worse than that, for there is strong evidence that performance in fact declines..... |

Diana v. State Board of Education C-70 37 RFT (Feb. 1970)

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| Court: | District Court of Northern California |
| Plaintiffs: | Diana and others. Class action suit on behalf of Mexican-American chileren in educable mentally retarded classrooms. |
| Defendants: | State Board of Education and various other California state and school officials. |
| Factual Issues Involved: | That the standardized intelligence tests specifically the Stanford-Binet and Wechsler were written entirely in English. They were given to children whose primary language was other than English. The question involved is whether the intelligence tests used were culturally biased. |
| Harm Alleged to be Suffered: | Irreparable injury of inadequate education and stigma of mental retardation. |
| Relief Sought: | Injunctive and declaratory relief against identification and placement and compensatory damages. |
| Results: | The case was settled out of court with the following main points of agreement: |

1. All children whose primary home language was other than English from now on had to be tested in both the primary language and in English.

2. Mexican-American and Chinese children already in classes for the mentally retarded had to be retested in their primary language.

3. In a school district which had a sufficient disparity between the percentage of Mexican-American students in their regular classes and its classes for the retarded had to submit an explanation citing the reasons for this disparity.

4. School psychologists were to work on norming a new or revised I.Q. test to reflect Mexican-American culture.

5. Competent school psychologists should administer individual intelligence tests in primary language/ or seek out an interpreter who may be either a psychology trainee or intern or some other employee of the school district.

6. Every school district was to submit to the state before

the next school year a summary of retesting and reevaluation and a plan listing special supplemental individual training which would be provided to help each student back into the regular school classes.

Comments:

The highlights of Diana are the agreement by the parties that individuals had to be tested in the primary language of the home and the questioning of the reason for the disproportionate number of minority children in the EMR classes.

The most astonishing aspect of the case was that the original school testing showed the plaintiff's intelligence test scores ranged from 30 to 72 with a mean score of 63. The retest by a bilingual examiner resulted in a range from 81 to 108 with a mean score of 96. One child raised her score 49 points.

Pennsylvania Association for Retarded Children for
Bowman, et al. v. the Commonwealth of Pennsylvania,
David H. Kurtzman, et al.
Civil No. 71-42 (U.S. District Court for the Eastern District of Pennsylvania, filed in 1970)

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| Plaintiffs: | The Pennsylvania Association for Retarded Children, 13 mentally retarded children as representative of the class of mentally retarded children of school age, and the parents of these 13 children (class action). |
| Defendants: | The Commonwealth of Pennsylvania, as represented by David H. Kurtzman, the Secretary of Education; the State Board of Education; the Acting Secretary of Public Welfare; and 13 school districts in the State of Pennsylvania, as representative of all other school districts in the state. |
| Factual Issues Involved: | The 13 named plaintiffs are all residents of the State of Pennsylvania between the ages of 6 and 20, who are eligible for a free public school education, but have either been excluded or excused from attendance at public school, or have had their admission to public school postponed and otherwise have been refused free access to public school education because they are retarded.<br><br>The parents of these children have borne the burden of the expenses of care, treatment and training, as well as transportation, for most, if not all of the child's eligibility for public school.<br><br>In many of the cases, the parents were not given the chance for a hearing or appeal on the exclusion decision. |
| Harm Alleged to Be Suffered: | Irreparable harm in being excluded from the public schools and in being deprived of an education and of the right and ability to earn their livelihood, in order to be at least partially self-supporting. |
| Results: | A consent agreement was reached on October 7, 1971.<br><br>The provisions of the agreement:<br><br>1. Provide access to free public programs of education and training to any mentally retarded child.<br><br>2. Prevent charging tuition or maintenance to a mentally retarded child, except on the same terms as may be applied to other exceptional children, including brain-damaged children.<br><br>3. Provide home-bound instruction to the mentally |

retarded child.

4. Require the defendants to provide, as soon as possible, access to a free public school program of education and training appropriate to his learning abilities to each plaintiff and each member of the plaintiff class.

5. Require the defendants to provide pre-school programs of education and training for mentally retarded children- wherever such programs are available for non retarded children.

Comment: This landmark case, decided by consent order, determined that:

> "all mentally retarded persons are capable of benefiting from a program of education and training: [the vast majority] are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education."

Stewart v. Phillips 70-1199 F. (Oct. 1970)

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| Court: | United States District Court of the State of Massachusetts |
| Plaintiffs: | 1. All Black and poor Boston Public School students who are not mentally retarded but were in special classes for the mentally retarded.<br><br>2. All Black and poor students who were mentally retarded but were denied placement in educational programs created for their special needs.<br><br>3. Parents of the students in the classes for the mentally retarded who were denied an opportunity to participate in the placement decision. |
| Defendants: | All members of the Boston School Committee, the Superintendent, the Deputy Superintendent, the Assistant Superintendent, the Acting Director of Public Schools Testing and Measurement Services, the Acting Director of the Department of Special Education, the Commissioner of the Board of Education for the State of Massachusetts, the Head of the Division of Special Education for the State of Massachusetts, and the Commissioner for the Department of Mental Health for the state. |
| Factual Issues Involved: | 1. Whether the Stanford-Binet and Wechsler tests actually measured the learning potential of of minorities, especially Blacks.<br><br>2. Whether irreparable harm results from misclassification and from lack of being placed in a class if indeed one is retarded.<br><br>3. Whether parents have the right to review the test scores and participate in the placement decision. |
| Harm alleged to be suffered: | Irreparable injury as a result of misclassification and no placement. |
| Results and Comments: | As a result of Stewart v. Phillips the Massachusetts State Board made the following new regulations:<br><br>1. Labels educable, trainable and custodial retarded were eliminated. Services are required based on child's needs, not labels.<br><br>2. Education programs for children with special needs must, to the degree possible, be integrated rather than separated & isolated. |

3. Children may not be denied education solely on basis of IQ score.

4. Children may not be denied required education, nor placed in a special program or tracked without a complete evaluation including family background.

5. Parents must be informed of proposed evaluation, results and recommendations of the evaluating team.

6. Evaluating team must meet with child's parents, who, if they disagree have right to word evaluation

7. Three levels of certification were established for school psychologist.

Guadalupe v. Tempi Elementary School District F. Aug., 1971

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| Court: | United States District Court of Arizona |
| Plaintiffs: | Class action suit on behalf of Mexican-Americans, Chicanos and Yaqui Indians. |
| Defendants: | Board of Education and school officials who have participated in the identification and placement practices for these youngsters. |
| Factual Issues Involved: | The standardized intelligence tests used to place these children in programs for the educable mentally retarded, the Stanford-Binet and Wechsler tests, were primarily written in English, therefore culturally biased. They were given to children whose primary language was other than English. |
| Alleged Harm Suffered: | Irreparable injury of inadequate education and stigma of mental retardation. |
| Results: | Stipulated agreement made on January 25, 1972. Permanent Regulations included the following points: |

1. No child to be placed in a special education class for EMR if he scores higher than 2 standard deviations below norm on an approved I.Q. test in his own language. Tests shall not be either the exclusive or primary screening device in considering the child for placement in classes.

2. No child shall be considered for placement in special education unless given an examination of developmental cultural background, school achievement which substantiates other findings of a handicap. Exams must include a home visit with parental permission and an interview in the primary language of the family.

3. If a school district enrolls any children of any racially linguistic or ethnic group in special classes in proportions substantially greater or lesser than that of the population of the school district as a whole, the school shall demonstrate "compelling educational justification."

4. All children with prime language other than English and assigned to EMR classes or TMR, at this time will be reassigned to regular classes before Oct. 1, 1973.

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| Comment: | The findings in this case are similar to Diana. However, the court went a little further by insisting that all previously placed students are to be assigned to regular classes. (See 4 above). |

Larry P. v. Riles C-71-2270 Filed November 24, 1971

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| Court: | U.S. District Court for Northern District of California |
| Plaintiffs: | Class action suit brought by parents of seven children labeled mentally retarded partly on the basis of test scores which indicated that children had I.Q. scores of less than 75. |
| Defendants: | Riles, Superintendent of Public Instruction in the state of California, members of the State Board of Education, the Superintendent of the San Francisco Unified School District and members of that Board of Education. |
| Factual Issues Involved: | 1. Plaintiffs have been the victims of the testing procedures that fail to recognize their unfamiliarity with white middle class cultural background which ignores the learning experiences which they may have had in their homes.<br><br>2. The tests used, Stanford-Binet and Wechsler Intelligence Tests, were standardized only on white Anglo-American children and there has been no restandardization to date. Thus, the test instrument does not properly assess Black children.<br><br>3. Improper placement is stigma-producing and it causes the child to receive ridicule from his peers and produces a profound sense of inferiority and shame in the child.<br><br>4. The parents argue that they represent a class of Black Children in California wrongly placed and maintained in classes for the mentally retarded. The plaintiffs come from families in which the primary culture is Black-American. The spoken language and communication skills reflect such variations and differences from the so-called Standard English as is consistent with their cultural background. |
| Alleged Harm to be Suffered: | Irreparable damage of inadequate education and stigma of mental retardation will inevitably result in the plaintiffs' being cut off from social and economic gains available to children in regular school classes, and they will be forced to suffer the humiliation of reliance upon public assistance. |
| Results: | No black student may be placed in EMR class on the basis of criteria which rely primarily on the results of I.Q. tests as they are currently administered, if the consequence of use of such criteria is racial unbalance in the composition of EMR classes. |

Ricci, et al. v. Milton Greenblatt, et al.
Civil No. 72-469F (D. Mass., Filed Feb. 7, 1972

Plaintiffs: The residents of Belcherton State School in Massachusetts (class action).

Defendants: Milton Greenblatt, who is the Commissioner of Mental Health; other Massachusetts government officials; and the Belcherton State School administrative personnel.

Relevant Factual Issues Involved: The complaint documents several areas of negligence:

1. Oppressive physical environment. This includes sanitary conditions, bathing facilities, shortages of equipment and supplies.

2. Lack of treatment. This includes physical therapy services, psychological services, dental services, and speech pathology services.

3. Regimented and Impersonal environment. This includes shortages in staff, improper use of punishment, and the refusal of treatment.

Harm Alleged to Be Suffered: The denial of medical and professional treatment is stated to represent a clear denial of plaintiffs' rights to equal protection under the law; thus it constitutes discrimination against the mentally retarded institutionalized residents.

Results: A temporary restraining order was issued in February, 1972, which:

1. prevented the defendants from admitting any other citizen to an institution until adequate treatment and humane conditions exist in those institutions;

2. required that a plan be developed for all residents, which would provide adequate and proper medical, dental, educational, nutritional, physical therapy, occupational therapy, psychological, social, recreational, speech therapy, and vocational therapy services; and

3. required that a complete evaluation of the medical needs of each resident be made and presented to the court within 30 days.

Comments: This case preceded Wyatt v. Stickney and New York Association for Mentally Retarded v. Rockefeller. It was the forerunner to the Court's involvement in treatment issues and the rights of confined individuals. It also called for a plan of treatment for residents.

Mills, et al. v. Board of Education of the District of Columbia, et al.

Civil Action (U.S. District Court for the District of Columbia, 1972)

Plaintiffs: Those school age children in the District of Columbia who are being denied a publicly supported education by the District. The plaintiffs are predominantly Black and poor and without financial means for obtaining a private education (class action).

Defendants: The Board of Education for the District of Columbia, the Superintendent of the Board of Education, the Superintendent of the Special Education Department, and all other members within the school who are responsible for either the education or the exclusion of those children.

Factual Issues Involved:

1. Plaintiffs were denied admission to the District of Columbia schools.
2. There was no formal determination of the basis of this exclusion, nor was there any provision for review or appeal of that decision.
3. These children have been labeled as behavior problems, mentally retarded, emotionally disturbed, or hyperactive.

Harm Alleged to Be Suffered:

1. The denial of an equal educational opportunity causes the plaintiffs to suffer continuous and irreparable harm in their future as students, wage earners, citizens and members of society.
2. The stigma which is attached to the plaintiff children by reason of the labeling causes irreparable harm.
3. The defendants' actions create a self-fulfilling prophecy, as was explained in Hobson v. Hansen (q.v.), which propels the plaintiffs towards an academic, social and economic failure.

Results: A summary judgment was declared in the case granting relief to the plaintiffs.

On the basis of the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States, the judge ruled that:

1. The defendants must:
   a. provide the plaintiffs with a publicly-supported education according to their needs; and
   b. initiate efforts to locate and assess other children in the same situation, so that appropriate placement can be made.

2. Due process requires a hearing before exclusion or expulsion or classification into special programs.

3. No handicapped child may be excluded from a regular public school assignment unless the child is provided:

   a) "Adequate alternative educational services suited to the child's needs, which may include special education or tuition grants and

   b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."

Comments: Mills has become a landmark case. It guarantees an education with an appropriate placement which is subject to a periodic review. It further requires due process safeguards prior to any change in a student's classification.

Covarrubias v. San Diego Unified School District

Civil No. 70-394-S (U.S. District Court for the Southern District of California, filed July, 1972)

Plaintiffs: Covarrubias, on behalf of himself,and all other minority students in the San Diego Unified School District who had been wrongfully placed and wrongfully retained in the Educable Mentally Retarded program (class action).

Defendants: San Diego Unified School District.

Factual Issues Involved:

1. Mexican-American and Black children are classified as educable mentally retarded, based on intelligence scores written in standard, middle-class white English.
2. The tests themselves were culturally biased in favor of white middle-class children.
3. The parents were not given an adequate opportunity to participate in the placement decision, nor was any opportunity for a fair and impartial hearing given.

Harm Alleged to Be Suffered: Irreparable injury from an inadequate education, as well as the stigma of mental retardation.

Results: The case was settled by a stipulated agreement, in which the San Diego Unified School District agreed to:

1. See to it that the parents are informed of their right to participate in the placement decision.
2. Establish annual reevaluation of students placed in the EMR program in order to determine whether they can be serviced in regular school classes.
3. Pay all named plaintiffs and each member of the class one dollar each, "as full and complete compromise of any and all rights" they have towards the district.
4. "Continue to observe the laws of the State of California" as established by Diana.

Comment: This case reinforces the findings in Diana and suggests "compensatory obligation" for misplacement or misclassification.

Wyatt v. Stickney

344 F. Supp. 387 (N.D. Alabama, 1972)
Appeal docketed, No. 72-2634, 5th Cir.,
(argument heard Dec. 6, 1972)

Plaintiffs: Originally, individuals who were considered mentally ill by the State of Alabama. The plaintiff class was expanded on August 12, 1971, to include residents of the Partlow State School and Hospital, a public institution for the mentally retarded (class action).

Defendants: Stonewall B. Stickney, the Commissioner of Mental Health for the State of Alabama; his deputy; and all other administrative officers of the State Hospitals and members of the executive branch of the Alabama State Government.

Factual Issues Involved: It is stated by the plaintiffs that:

1. Partlow State School and Hospital is a warehousing institution incapable of providing habilitation and treatment. It is conducive only to the deterioration and debilitation of its residents.
2. The wards at the Hospital are grossly understaffed.
3. Physical facilities, as well as inadequate staff ratio, prevent the attainment of even minimal custodial care.

Harm Alleged to Be Suffered: Serious and irreparable harm and injury by reason of being deprived of the right to treatment and the right to develop innate abilities in order to return to community life and contribute to one's own livelihood.

Results: Adequate habilitation of residents:

a) Residents shall have the right of habilitation, including mental treatment, education and care. Within 90 days, a complete evaluation on each resident is to be accomplished, and several annual reports are to be distributed to the next of kin.

b) Individualized rehabilitation plans must be developed prior to residents' admission to the Institution. The total admission and evaluation of a resident shall take place within 14 days.

c) As part of this habilitation planning, each resident shall have an individualized post-institutional plan. This plan shall begin prior to the resident's admission to the Institution, and institution shall complete such plans as practical after his entry.

d) The responsibility for continuity of care and rehabilitation into community life upon the return

to the community is also charged to the institution.

Comments: The two major components of this case are:

1. The court held that the residents of an institution for mentally ill and mentally retarded held a constitutional right to receive treatment and
2. The court held that the institution had an obligation to return the patients to the community so that they can live in conditions as close to normal as possible.

The New York State Association for Retarded Children

and Parisi v. Nelson Rockefeller

Cases No. 72-6-556-7
(E.D.N.Y., April 10, 1973)
(both actions filed together)

Plaintiffs: New York State Association for Retarded Children on behalf of all alleged retarded persons now resident at Willowbrook. The class consists of over five thousand members. (Class action).

Defendants: Nelson Rockefeller and other State governmental and Willowbrook hospital officials in charge of services to the inmates of Willowbrook.

Factual Issues Involved:

1. There is no set goal for the education and habilitation of any resident.
2. Most residents are not receiving:
   a) School classes;
   b) Pre-vocational training; and
   c) Vocational training.
3. Plaintiffs have been denied adequate treatment, and have been subjected to the following conditions: overcrowding, lack of qualified staff, improper placement, questionable medical research, brutality, peonage, extended solitary confinement and almost total absence of theapeutic care.

Harm Alleged to Be Suffered: In addition to the rights which had been denied under the above state Consitutional Amendments, the suit charges that State officials had full knowledge of conditions at Willowbrook and had the power and authority to change them but none the less "created, fostered, and condoned less than minimum standards to treatment." The inmates of Willowbrook have been forced to live under these conditions.

Relief Sought:

1. That a judgment be issued declaring that Willowbrook does not meet Constitutional minimum standards of adequate habilitation, including care, treatment, education, and training.
2. That the court will determine, specify the Constitutional minimum standards of adequate habilitation for the residents of Willowbrook.
3. That the plaintiffs be granted a preliminary injunction and that a permanent injunction be given to rectify the unconstitutional conditions, policies, and practices which have been alleged.

4. That the defendants provide for the residents now in Willowbrook appropriate additional habilitation which may be necessary to compensate for the regression and deterioration that they have suffered.

Results:

The court ruled in favor of the plaintiffs and set up court decrees for the process of care and treatment. Among these decrees were:

1. Each resident shall have an individual plan of care, development and services which shall be prepared and re-evaluated at least annually by an interdisciplinary team of direct care and appropriate professional staff as described in this judgment, after comprehensive diagnostic testing and evaluative screening. The development plan (actual programming) shall be regularly received by the team at least quarterly.

2. The education philosophy shall be that all residents are presumed to be capable of benefiting from education. All residents shall be provided a full and suitable educational program regardless of chronological age, degree of retardation or accompanying disabilities or handicaps. No resident shall be presumed to be incapable of educational development.

3. Educational services at Willowbrook shall, at least, be generally equivalent to the special educational services provided in New York City in terms of:

   a) Staff qualifications and competencies, in-service training, and diagnostic or prescriptive teachers;

   b) Program hours per student;

   c) Nature, content, and quality of programs; and

   d) Curriculum guides, equipment, resource materials and diagnostic, testing, and screening procedures.

4. Sufficient bilingual/bicultural staff and instructional and testing materials shall be provided to meet the needs of residents from Spanish-speaking backgrounds.

Comments:

The most critical aspect of this case, decided in 1975, is the nature, scope, and extent of the court's involvement. The court specified the entire program for the institution ranging from education to salaries of personnel. It appears that where the institutions are not protecting individual rights the courts will step in and take over the policy decisions of the institution.

Lebanks v. Spears

Civil No. 71-2897 (E.D. La., filed April 24, 1973)

Plaintiffs: Eight Black children, classified as mentally retarded, on behalf of themselves and all others similarly situated (class action).

Defendants: Orleans Parish (New Orleans) School Board and the Superintendent of Schools.

Factual Issues Involved: The plaintiffs have stated that:

1. The Orleans Parish School Board has failed to provide an education for many children requiring special education; no children over the age of 13 were ever placed in special education classes.
2. There is an inequality of education between:
   a. normal and mentally retarded children; and
   b. Black mentally retarded children and white mentally retarded children.
3. The classification of children as mentally retarded is done:
   a. arbitrarily and without valid reasons;
   b. without advising children (or their parents) of their right to a hearing; and
   c. without the opportunity or requirement for later reevaluation.

Harm Alleged to Be Suffered: The continued deprivation of education "...will render each plaintiff and member of the class functionally useless in our society; each day leaves them further behind their more fortunate peers."

Results:

1. Every child who is mentally retarded or suspected of being mentally retarded is entitled to
   a. evaluation and development of a special education plan and periodic review and
   b. provision of a free public program of education and training appropriate to his age and mental status...
2. Persons who are beyond school-age, but who were denied education when they were of school-age, are entitled to compensatory programs of education.
3. Before any child is classified as mentally retarded, he or she is entitled to full due process procedural rights, including the right to written notice, an alternative evaluation, and a formal hearing.

Comment: This case did not come to trial since the defendants agreed to meet the majority of the suit's demands. The extending of rights of education to over school-age people is the most interesting and unique element of this case. Although it did establish a legal precedent it served to inspire other court cases and legislative mandates.

Merriken v. Cressman

Civil Action No. 72-2057 (U.S. District Court, Pennsylvania, filed 1973).

Plaintiffs: Junior high school student and his mother brought action.

Defendants: The Montgomery County Commissioners, the members of the Norristown Area School Board, the Superintendent of Schools of the Norristown Area School Board, and the Principal of Stewart Junior High School.

Factual Issues Involved:

1. Before suit was started, defendants did not obtain the affirmative consent of parents to the participation of their children in the Critical Period of Intervention (CPI), which was a drug prevention program.
2. CPI contained no provision for student consent.
3. Placement in program is tantamount to negative labeling.
4. Questionnaires asked personal and private questions about family and fellow students.

Results:

1. Right to privacy is on an equal or possibly more "elevated pedestal than certain other individual constitutional rights",and extends to juveniles.
2. Waivers of constitutional rights must be "knowing, intelligent, and done with sufficient awareness of relevant circumstance and likely consequences",which for juveniles, implies informed consent of the parents.
3. Questionnaires inquiring directly to the individual's family relationship and rearing as well as information about perrs must gain the informed consent of the individual and family.

Comment: Although not related directly to handicapped persons, the implications have great valididy for informed consent. Informed consent means that the parents must be given complete information about the potentially deleterious effects, such as "scapegoating of nonparticipants and self-fulfilling prophecy," in any program placement.

Testimony from the case indicates possible directions the courts are leaning.

"The average American parent has a great and naive faith in 'scientifically' constructed tests. This faith is reinforced by the unconscious desire of the more insecure parents to avoid involvement and to depend on 'professionals' to make the difficult decisions in the education and

maturation of their children . . .

In all probability, he is not clear regarding the qualifications of the school 'psychologist' who is likely to hold a master's degree in school psychology, not from the psychology department of a college or university, but from an education school or department. Chances are great he has not had significant supervision in a hospital, or outpatient clinic, or from a clinical psychologist or psychiatrist. He is likely to be considered 'untrained' by the persons that parents have in mind when they 'picture' a psychologist . . . Informed consent for personality testing should be comparable to the informed consent ideally obtained by a physician prior to the performance of surgery . . ."

# REFERENCES

The following is a compilation of various books, journals, and newsletters pertinent to the institutes. The references may be used to provide an awareness in two major areas: Law and education, and Consultation related to School Psychology.

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A source for current litigation information on the rights of children.

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Quarterly report of current events, places, people and things impacting on handicapped individuals. Free.

For further information and copies of this institute report and other documents produced through the Michigan Resource Center (Title VI-C), contact:

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